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No. 15251

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United States Court of Appeals

for the Ninth Circuit

CHOW BING KEW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Northern Division.

FILED
NOV -7 1956
PAUL P. O'BRIEN, CLERK

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United States
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CHOW BING KEW,

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UNITED STATES OF AMERICA,

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Transcript of Record

Appeal from the United States District Court for the Northern District of California, Northern Division.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney;

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Sacramento, California,

Attorneys for the United States.

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Stockton, California;

KENNETH G. McGILVRAY,
Forum Building,
Sacramento, California,

Attorneys for the Defendant.

In the District Court of the United States for the Northern District of California, Northern Division

Cr. No. 11,378

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHOW BING KEW, Alias SAM WAHYOU, Alias DONALD HAROLD WAHYOU,

Defendant.

INDICTMENT

(18 U.S.C.A. 911, False Claim of Citizenship; 18 U.S.C.A. 1001, False Statement.)

The Grand Jury Charges:

Count One: That Chow Bing Kew, alias Sam Wah You, alias Donald Harold Wah You (hereinafter called "said defendant"), heretofore, to wit: On or about January 18, 1952, at Stockton, County of San Joaquin, State and Northern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did knowingly, and unlawfully falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States. (18 U.S.C.A. 911.)

The Grand Jury Further Charges:

Count Two: That on or about April 14, 1953, at Stockton, County of San Joaquin, State and North-

ern Division of the Northern District of California, and within the jurisdiction of this Court, did unlawfully, knowingly, and wilfully falsify, conceal, and cover up by trick, scheme, and device a material fact and made a false, fictitious and fraudulent statement or representation to Roy R. Anderson, an investigator of the Immigration and Naturalization Service of the Department of Justice, a department of the United States, by telling him he was a citizen of the United States of America, knowing such statement or representation to be false, fictitious, and fraudulent in that he was not a citizen of the United States of America. (18 U.S.C.A. 1001.)

A True Bill.

/s/ ROYSE CLAYTON,
Foreman.

Bail, $2,500.00.

LLOYD H. BURKE,
United States Attorney;

By /s/ ROBERT E. WOODWARD,
Assistant U. S. Attorney.

[Endorsed]: Filed April 29, 1955.

[Title of District Court and Cause.]

RULING ON MOTIONS FOR JUDGMENT OF ACQUITTAL

Count one of a two-count indictment charges the defendant with a violation of 18 U.S.C.A. § 911[1] in that he falsely represented himself to be a citizen without having been admitted to citizenship. The government's proof on this count consisted of an application for a California alcoholic beverage license filed January 18, 1952, signed by the defendant. In response to a question contained in the application, "Are you a citizen of the United States?" the word "Yes" had been typed. Defendant admits he is not a citizen of the United States. He has resided continuously in this country since his arrival from China in 1929 as a merchant's son, and he has never been naturalized.

The laws of California do not require that a licensee of the type involved in this case must be a citizen of the United States. Accordingly, defendant urges that his affirmative answer was irrelevant, and therefore no violation of § 911 was committed by him.

In United States v. Achtner, 144 F. 2d 49 (2nd Cir. 1944), the defendant in answer to a questionnaire of his employer, a private corporation, stated

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[1]The pertinent provisions of which are:
"Whoever falsely and wilfully represents himself to be a citizen of the United States shall be * * *" punished.

that he was a citizen of the United States. In affirming his conviction, the court held that the inquiry of the employer was legitimate and that "the representation of citizenship must still be made to a person having some right to inquire or adequate reason for ascertaining a defendant's citizenship; it is not to be assumed that so severe a penalty is intended for words spoken as a mere boast or jest or to stop the prying of some busybody, * * *." In United States v. Tandaric, 152 F. 2d 3 (7th Cir. 1945), a conviction was affirmed where a similar false representation had been made to a prospective private employer. In neither of these cases was there any legal requirement that the defendant make a statement concerning his citizenship. Likewise, in United States v. Franklin, 188 F. 2d 182 (7th Cir. 1951), a false affirmative answer to the question "Citizen of U. S.?" on an application for employment with a private corporation was held to be a violation of § 911. In the Franklin case, the court also upheld convictions based on the defendant's false statements that he was a citizen of the United States at the time he registered to vote in the state of Illinois, the law limiting the right to vote to citizens of the United States.

In De Pratu v. United States, 171 F. 2d 75 (9th Cir. 1948), the indictment charged the defendant with making a false statement of citizenship in an application for a retail liquor license filed with the Montana Liquor Control Board, by stating he was a citizen of the United States, when in fact he was

not such a citizen. At the time the application was filed, no one but a citizen was eligible for a liquor license under Montana law. The conviction was affirmed. Later, the same court in Smiley v. United States, 181 F. 2d 505 (9th Cir. 1950), denied appellant's contention that the standard set up in De Pratu constituted the minimum requirement for conviction under § 911. The court said, at page 508:

> "We hold that where some right to inquire exists or the person inquiring has a good and sufficient reason for learning the citizenship of the person asked, it is sufficient, and that the inquiring officer in this case was a person with a right to inquire and a sufficient reason for so doing."

In Smiley, the false representation as to citizenship was made by the defendant after arrest, and during the process of booking, in which information was elicited from him.

Sale and control of the use of intoxicating liquors have presented perplexing social and economic problems for centuries. That a state under its police power may regulate the control and traffic of intoxicating liquors for the reason that it concerns a business attended with danger to the community cannot be questioned. Crowley v. Christensen, 137 U.S. 86 (1890).

Applying the foregoing law to the facts of this case, it is the opinion of the court that a false representation of citizenship on an application for a state alcoholic beverage license constitutes a vio-

lation of § 911, even though the law does not require that the applicant be a citizen of the United States in order to obtain the license applied for. The statement was made to an agency of the state which had a right to inquire into the background and status of a prospective licensee, and in so doing to determine whether the applicant was a citizen of the United States.

Defendant testified that he signed the application for a liquor license without reading it because it was his practice to sign any such document presented to him by his employees or by his attorney. This glib accused who described himself as the president of several corporations operating supermarkets as well as engaged in the business of "General merchant, grocery store, meat market, furniture store, drug store, department store, cattle business, rancher, and Northwestern Development Company, uranium business, farmer," and who has amassed a fortune of half a million dollars while so engaged, is in no position to relieve himself of criminal responsibility because of claimed ignorance. On the contrary, his brash carelessness, if such be the case, emphasizes his criminality.

Count two of the indictment charges the defendant with a violation of 18 U.S.C.A. § 1001[2] in that

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[2]The pertinent provisions of which are:
"Whoever, in any matter within the jurisdiction of any department or agency of the United States * * * makes any false, fictitious, or fraudulent statements or representations * * * shall be * * *" punished.

he made a false statement or representation to an investigator of the Immigration and Naturalization Service by telling him he was a citizen of the United States, knowing that such statement or representation was false.

On April 14, 1953, Roy R. Anderson, an investigator with the Immigration and Naturalization Service, acting pursuant to an official request to investigate the defendant's citizenship status, met defendant at the latter's place of business. A previous attempt to contact defendant had failed, but defendant was aware of the fact that the Immigration and Naturalization Service had made such attempt, and that a representative of the Service "will be back to see me." Anderson identified himself as an investigator of the Immigration and Naturalization Service, advised the defendant that he had received information defendant was not a citizen of the United States and that he "was there to check with him and find out." At that time and place, defendant stated to Anderson: "I am a citizen of the United States. I was born in Sacramento, California." During this interview, defendant gave Anderson additional information which would aid Anderson in locating the records to verify defendant's statements. After giving his "real" name and date of birth (the name and date of birth of his alter ego), he gave Anderson the names of his "father" and "mother" to assist in checking the record of his birth. He also volunteered the information that a United States passport had been

issued to him by the State Department and that he had made a trip to China, giving the dates of departure and return.[3]

In answer to Anderson's testimony, defendant testified his statements were made in good faith because he went through a form of adoption in Sacramento, California, in 1934, at which time he was led to believe that he had been legally adopted and thereafter assumed the name, date and place of birth of a deceased person into whose alter ego he was thereby placed. This explanation would seem plausible if made by one with less acumen than the defendant. He knew that the Immigration and Naturalization Service had tried to contact him the year before, and that several years prior thereto that same agency had refused to issue a re-entry permit to him because he had failed to satisfactorily establish that he was a citizen of the United States by virtue of his birth in Sacramento.

By his own testimony, defendant showed a keen awareness of his desire for and the desirability of American citizenship, so much so, in fact, that the court is satisfied he knew at all times the dual role he was playing. About two months after the April, 1953, interview, when faced with a warrant of arrest for deportation, defendant upon the advice of and in the presence of his attorney, made a full disclosure of the facts relating to his background and the lie he had been living. This revelation could

[3]These facts the court finds to be true on the basis of conflicting testimony.

and should have been made to Anderson on April 14, 1953, or, in the alternative, defendant could have remained silent and asked for time to consult with counsel. Instead, he voluntarily chose to lead the investigator on a trail which might have terminated the investigation and again delay the day of reckoning.

For a person of defendant's intelligence, ability, and experience, it would seem that the truth could have been spoken without the advice of counsel when he was confronted by a person who had a perfect right to make the inquiries Anderson made on April 14, 1953.[4]

Defendant's version of the April 14, 1953, interview[5] is colorful and colored for the trial of the

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[4]Anderson was authorized to interrogate defendant as a person believed to be an alien, as to his right to be or to remain in the United States. 8 USCA § 1357 (a) (1).

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[5]"Q. All right. Tell the Court the circumstances under which you met him (Anderson), who was present and all about it.

"A. I had the note from my girl, secretary, give it to me. The note say this—I didn't keep the note. The secretary give me the note. She said the Immigration Service from San Francisco come to see me during 1951—no—yes, 1951, no—say '52, say he will be back to see me. The first time I see him, I can't tell you exactly the date, but during April.

"Q. April what year?

"A. 1953. 1953. He come to see me in the morning. I saw him. He is walking around the store, the main floor. So I was there pretty early so he didn't know me, I didn't know him. I asked him, 'Sir, are you looking for something?'

case. It does, however, clearly indicate his awareness of the falsity of his statements and the necessity for skillful maneuvering.

A collection and discussion of cases construing § 1001 are contained in Knowles v. United States, 224 F. 2d 168, 171, 172 (10th Cir. 1955), affirming a conviction for knowingly making or causing to be made a false and fraudulent statement and representation to internal revenue agents during the

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"He said he is looking for Sam Wah You. I said, 'That is me.'

"He said, 'Like to talk to you.'

"I said, 'Sure. Come up.'

"It was early so I take him to my office, and he has another man with him, Chinese fellow. So he say, 'You speak good English.'

"I said, 'Yes, I don't need no interpreter.'

"So the Chinese fellow downstairs. Mr. Anderson and I went to my office. He asked me, he say, 'What is your name?'

"I said, 'You know that, Sam Wah You.'

"He say, 'Where you born?'

"I said, 'I born in Sacramento.' He says—then I told him, 'What is all about it? What you what?'

"He said, 'I am from Immigration.'

"'Oh,' I said, 'You from Immigration. You have anything to show me you are from Immigration?'

"Then he show me like a pocketbook with a badge in it. Excuse me. He show me that. So I say, well, I say, 'I can't talk to you about this matter. I am planning going away with the lawyer back east. Why can't we arrange another time when I come back? I either call you or you call me, about a couple of months, as soon as we come back, and I give you the true statement. And also when you come, you bring the machine, record it down.'

"I said, 'Don't bring the people here that write down. I don't like that. I would like to have my own words sticking into there.'

course of an investigation of the correctness of a taxpayer's returns.[6]

In United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953), Circuit Judge Pickett said:

> "When the charge involves statements made when not under oath a reasonable and sensible construction of the statute would be to limit its application to persons under legal obligation to speak or to give information to representatives of an agency or department of the United States who have authority to finally dispose of the matter being investigated, * * *."

In sum, the facts show that Anderson, as an investigator for the Immigration and Naturalization Service, pursuant to orders in a matter within the jurisdiction of the Service, after identifying himself and advising defendant of the nature of the investigation, gave defendant an opportunity to give in-

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"So, I don't think we have been there very long, maybe five minutes, three minutes, I don't know, I can't tell you exactly, but very short time.

"He said, 'That is fine, and I be back.'

"So then he left.

"Q. All right. Now, at that time did you tell him that you were a citizen of the United States?

"A. I don't think so, definitely I say, no. I told him I born in Sacramento. He asked me where I am born and I say I was born in Sacramento."

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[6]Reference is made to Judge Murrah's analysis of the cases, especially Cohen v. United States, 201 F. 2d 386, and Marzani v. United States, 83 U.S. App. D.C. 78, 168 F. 2d 133; also United States v. Levin, 133 F. Supp. 88, and United States v. Stark, 131 F. Supp. 190.

formation relative to whether he was a citizen of the United States. The statements made by defendant at the time were false, and were known by him to be false.

As to the second count, the court is satisfied from the evidence, which it believes to be true, that the government has sustained its burden of proof.

The court finds the defendant guilty as charged in counts one and two of the indictment, and the motions for judgment of acquittal as to counts one and two are denied.

Dated this 24th day of May, 1956.

/s/ JON WIIG,
United States District Judge.

[Endorsed]: Filed May 28, 1956.

In the District Court of the United States for the Northern District of California, Northern Division

Cr. No. 11378

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHOW BING KEW, Alias SAM WAHYOU, Alias DONALD HAROLD WAHYOU,
Defendant.

JUDGMENT

In accordance with the findings of fact and conclusions of law contained in the ruling on motions

for judgment of acquittal filed herein, it is the judgment of the court that the defendant is guilty as charged in counts one and two of the indictment.

Further, it is ordered that the defendant be referred to the Probation Office for a presentence report, and the time of sentence is tentatively set for June 26, 1956, at 2 p.m. in the United States Courthouse in Sacramento, California.

Dated this 24th day of May, 1956.

/s/ JON WIIG
United States District Judge.

[Endorsed]: Filed May 28, 1956.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The Defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying Defendant's motion for judgment of acquittal made at the conclusion of the evidence.

2. The judgment is contrary to the weight of the evidence.

3. The judgment is not supported by substantial evidence.

4. The Court erred in overruling objections to questions addressed to the witness Roy Anderson.

5. The Court erred in admitting testimony of the witness Roy Anderson to which objections were made.

/s/ FORREST E. MACOMBER,

/s/ KENNETH G. McGILVRAY,

Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 2, 1956.

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Now comes Chow Bing Kew, the Defendant in the above-entitled case, and moves that the judgment of guilty returned against him by this Court dated the 24th day of May, 1956, and filed May 28, 1956, be arrested and no judgment and sentence be imposed thereon for the following reasons:

1. That the indictments upon which the Defendant was tried and convicted do not state facts sufficient to constitute a crime against the United States.

/s/ FORREST E. MACOMBER,

/s/ KENNETH G. McGILVRAY,

Attorneys for Defendant.

Receipt of copy acknowledged.

Affidavit of service by mail attached.

[Endorsed]: Filed June 2, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: United States Attorney.

Please Take Notice that Defendant's Motion in Arrest of Judgment and, also, Defendant's Motion for New Trial, served herewith, will be heard before the United States District Court for the Northern District of California, Northern Division, at 2:00 o'clock p.m. on the 26th day of June, 1956, in the United States Courthouse in Sacramento, California.

Dated: June 1, 1956.

/s/ FORREST E. MACOMBER,

/s/ KENNETH G. McGILVRAY.

Receipt of copy acknowledged.

Affidavit of service by mail attached.

[Endorsed]: Filed June 2, 1956.

[Title of District Court and Cause.]

NOTICE

To: Lloyd H. Burke, United States Attorney;

To: Robert E. Woodward, Assistant U. S. Attorney; and

To: Bruce Barber, District Director, Immigration and Naturalization Service:

Please Take Notice that the Defendant above named, Chow Bing Kew, will, at the time of sentencing said Defendant, to wit: on the 26th day of June, 1956, at 2:00 o'clock p.m. of said day, in the United States Courthouse in Sacramento, California, request the above-entitled United States District Court for the Northern District of California, Northern Division, to recommend to the Attorney General that said Defendant not be deported by reason of his conviction of a false claim of citizenship (18 U.S.C.A. 911) and a false statement to an investigator of the Immigration and Naturalization Service of the Department of Justice, a department of the United States (18 U.S.C.A. 1001), under the provisions of 8 U.S.C.A., Paragraph 1251 (b).

Dated: June 21, 1956.

/s/ FORREST E. MACOMBER,

/s/ KENNETH G. McGILVRAY.

Affidavits of Service by Mail attached.

[Endorsed]: Filed June 22, 1956.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Tuesday, the 26th day of June, in the year of our Lord one thousand nine hundred and fifty-six.

Cr. 11,378

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHOW BING KEW,

Defendant.

Present: The Honorable Jon Wiig, District Judge.

ORDER

This case came on regularly this day for judgment, hearing on the motion for a new trial and in arrest of judgment. Robert E. Woodward, Esq., Assistant U. S. Attorney, was present for and on behalf of the United States. The defendant, Chow Bing Kew, was present in Court with Forrest E. Macomber, Esq., and Kenneth McGilvray, Esq., his attorneys. After hearing the arguments of counsel, and due consideration having been had thereon, it is Ordered that the motions for a new trial and in arrest of judgment be and the same are hereby denied.

The defendant, Chow Bing Kew, was called for judgment. After hearing counsel, it is Ordered that

the defendant be and he is hereby committed to the custody of the Attorney General of the United States or his authorized representative for a period of 18 months and pay a fine to the United States of America in the sum of $1,000.00 on the 1st count of the Indictment, and for the period of 18 months and pay a fine to the United States of America in the sum of $5,000.00 on the 2nd count of the Indictment. The motion recommending that the defendant be not deported was considered and the Court makes no recommendation either way. It is further Ordered that the defendant be released on bail pending appeal, and that his bond be set in the sum of $5,000.00. It is further Ordered that the defendant be and he is hereby remanded to the custody of the U. S. Marshal.

United States District Court for the Northern District of California, Northern Division

No. 11,378—Cr.

UNITED STATES OF AMERICA

vs.

CHOW BING KEW

JUDGMENT AND COMMITMENT

On this 26th day of June, 1956, came the attorney for the government, and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Finding of Guilty of the offense of violation of Title 18, USCA 911 (False Claim of Citizenship) and Title 18, USCA 1001 (False Statement) in that on or about January 18, 1952, the defendant at Stockton, California, did knowingly and unlawfully falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States (Count One); that on or about April 14, 1953, at Stockton, California, the defendant did falsify, conceal, and cover up by trick, scheme, and devise a material fact and made a false, fictitious and fraudulent statement to an investigator of the Immigration and Naturalization Service, by telling him he was a citizen of the United States, said defendant knowing such statement or representation to be false, fictitious, and fraudulent in that he was not a citizen of the United States (Count Two) as charged in the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) Months and pay a fine

in the sum of One Thousand Dollars ($1,000.00) on Count One of the Indictment.

Eighteen (18) Months and pay a fine in the sum of Five Thousand Dollars ($5,000.00) on Count Two of the Indictment.

It Is Ordered that the periods of imprisonment herein imposed are to commence and run concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JON WIIG,
United States District Judge.

The Court recommends commitment to a United States penitentiary.

C. W. CALBREATH,
Clerk;

By /s/ C. A. CYR, Deputy Clerk.

[Endorsed]: Filed and entered June 26, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Name and Address of Appellant: Chow Bing Kew, 1225 South San Joaquin Street, Stockton, San Joaquin County, California.

Names and Addresses of Appellant's Attorneys: Forrest E. Macomber, 711 Bank of America Bldg., Stockton, California, and Kenneth G. McGilvray, Forum Building, Sacramento, California.

Offense—Count One: That the Defendant heretofore on or about January 18, 1952, at Stockton, County of San Joaquin, State and Northern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did knowingly, and unlawfully falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States—a violation of 18 USCA 911.

Count Two: That the Defendant on or about April 14, 1953, at Stockton, County of San Joaquin, State and Northern Division of the Northern District of California, and within the jurisdiction of this Court, did unlawfully, knowingly, and wilfully falsify, conceal, and cover up by trick, scheme, and devise a material fact and made a false, fictitious and fraudulent statement or representation to Roy R. Anderson, an investigator of the Immigration

and Naturalization Service of the Department of Justice, a department of the United States, by telling him he was a citizen of the United States of America, knowing such statement or representation to be false, fictitious, and fraudulent in that he was not a citizen of the United States of America—a violation of 18 USCA 1001.

Brief Description of Judgment or Sentence: 18 Months Federal Penitentiary and fine of $1,000.00 on the 1st Count; and 18 Months Federal Penitentiary and fine of $5,000.00 on the 2nd Count. The periods of imprisonment to run concurrently.

I, the above-named Defendant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment of the Court made in the above-entitled matter under date of May 24, 1956, and filed in said Court on May 28, 1956, and from the judgment and sentence of the Court imposed on June 26th, 1956.

Dated: June 26, 1956.

/s/ CHOW BING KEW,
Defendant.

/s/ FORREST E. MACOMBER,

/s/ KENNETH G. McGILVRAY,
Attorneys for Defendant.

[Endorsed]: Filed June 26, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
State of California,
County of Sacramento—ss.

Kenneth G. McGilvray, being first duly sworn, deposes and says:

That he is one of the Attorneys for the Defendant and Appellant in the above-entitled matter;

That Notice of Appeal in the above-entitled proceeding was filed on June 26, 1956, and that, therefore, the time for filing and docketing the record on appeal in the United States Court of Appeals for the Ninth Circuit will expire on the 3rd day of August, 1956;

That the Court Reporter who reported the original trial in this proceeding, to wit, Elbert Cripps of Honolulu, T. H., has just advised Affiant that he will be unable to complete the preparation of the transcript within said time due to the press of court business in Honolulu, T. H., and that he will need a thirty (30) day extension from and after August 3, 1956, within which to prepare said transcript so that the same can be filed and docketed with the record on appeal.

Wherefore, Affiant respectfully requests that the Defendant and Appellant herein be granted such thirty-day extension and that the time for filing the record on appeal and docketing the proceedings in

this cause on appeal be extended to September 4, 1956.

/s/ KENNETH G. McGILVRAY.

Subscribed and sworn to before me this 19th day of July, 1956.

[Seal] /s/ DANIEL M. CAMERON,
Notary Public in and for the County of Sacramento, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 25, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING ACTION

Upon reading the Affidavit of Kenneth G. McGilvray, one of the Attorneys for Defendant and Appellant herein, and for good cause shown, it is by the Court this 23rd day of July, 1956,

Ordered: That the time for filing the record on appeal and docketing the proceedings in this cause on appeal, be, and the same is, hereby extended to September 4, 1956.

Dated: July 23, 1956.

/s/. JON WIIG,
Judge of the United States District Court.

[Endorsed]: Filed July 25, 1956.

In the District Court of the United States for the Northern District of California, Northern Division

No. 11,378—Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHOW BING KEW, Alias SAM WAHYOU, Alias DONALD HAROLD WAHYOU,

Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S. District Court, Sacramento, California, on December 14, 1955, commencing at 10:00 o'clock a.m.

Before: Hon. Jon Wiig, Judge.

Appearances:

For the Plaintiff:
ROBERT WOODWARD, ESQ.,
Assistant U. S. Attorney.

For the Defendant:
FORREST E. MACOMBER, ESQ., and
KENNETH McGILVRAY, ESQ.,
Of the Firm of McGilvray, McGilvray & Cameron.

December 14, 1955—10:00 A.M.

(Case called by the clerk.)

Mr. Woodward: Ready for the government.

Mr. McGilvray: Ready for the defense, your Honor.

The Court: Let me get your names straight, please.

Mr. McGilvray: I am Kenneth McGilvray, sir. of Sacramento, of the firm of McGilvray, McGilvray & Cameron. I would like to introduce Mr. Macomber, who is chief counsel in this case, Forrest E. Macomber, of Stockton.

The Court: Are you ready to proceed, Mr. Woodward?

Mr. Woodward: Yes, your Honor. If the Court please, in the interests of saving time—counsel wishes to eventually put on evidence regarding the execution of it—I would like to introduce into evidence a photostatic copy of application for alcoholic beverage license which was attested on the 18th of January, 1952, and signed by Sam Wahyou. That document in printing says: "Are you a citizen of the United States?" The answer is: "Yes." And that is what we are relying upon primarily to substantiate Count 1.

The Court: Do you stipulate to that?

Mr. McGilvray: We stipulate, your Honor, that this is a true and exact copy, that it does bear the signature of Sam Wahyou, the defendant, who is also known as Chow Bing Kew, his true name.

Chinese name being Chow Bing Kew. [2*] However, we reserve the right, as Mr. Woodward has stated, in that we wish to introduce evidence of the execution of this document and explain the circumstances of it. And there are some additions and changes on the application which will be explained. Is that satisfactory, Mr. Woodward?

Mr. Woodward: Satisfactory, your Honor.

The Court: Very well. That photostatic copy will be received as Exhibit No. 1.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 1.)

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

3U

J-1-45-9778

To: [redacted]

[redacted]

1020 N Street, Sacramento 14, California

The undersigned hereby applies for license as follows:

TYPE OF LICENSE—APPLICATION FEE					
Off Sale Beer & Wine	[redacted]		2	[redacted]	
	1	5.00			
TOTAL (REFUND)	[redacted]	[redacted]	35		

1. Name of applicant (If a partnership, give names of all partners. If a corporation, give corporate name, names and titles of principal officers and directors.) [redacted] PLEASE PRINT

2. Name under which business is to be conducted (if any) [redacted]

3. Location of premises where business is to be conducted (Give street and number if possible—otherwise accurate description.) Hwy 4 [redacted] Number [redacted] Route

[redacted] City [redacted] Zone No. [redacted] County

4. Mail address (if different) [redacted]

5. Are premises inside of corporate city limits? no Seller's Permit No. [redacted]

6. Are these premises now licensed? [redacted]

7. Have you ever had a State liquor license refused, suspended or revoked? [redacted] If so, show type of license no

8. Are you a citizen of the United States? yes If naturalized, Date [redacted] Where [redacted]
Yes or No

9. Have you ever been convicted of a felony? no If so, attach rider showing particulars.

10. Have you ever violated any of the provisions of the Alcoholic Beverage Control Act or regulations of the Board pertaining to the Act? no If so, attach rider showing particulars.

11. Do you agree (*a*) that any manager employed in the business will have all the qualifications of a licensee and (*b*) that you will not violate or cause or permit to be violated any of the provisions of the Alcoholic Beverage Control Act, particularly any of the provisions of Section 54 or 55 of said Act, or regulations of the Board pertaining to the Act yes.

12. Section 16545 of the Business and Professions Code provides that all State licensing agencies shall require that applications filed with them, designate the name of the applicant's workmen's compensation insurance carrier. I am/we are aware of the provisions of Section 3700 of the Labor Code which requires every employer to be insured against liability for workmen's compensation. The name of my/our workmen's compensation insurance carrier is: [redacted]

STATE OF CALIFORNIA } ss.
COUNTY OF [redacted]

INVESTIGATION
DEPARTMENT
DATE JAN 28 1952

Each person whose signature appears below, being first duly sworn, deposes and says: (1) That I am the applicant, or one of the applicants, or president or secretary of the applicant, named in the foregoing application, duly authorized to make this application on its behalf; (2) that I have read the foregoing application and know the contents thereof and that each and all of the statements therein made are true; (3) that no person other than the applicant or applicants has any direct or indirect interest in the applicant's or applicants' business to be conducted under the license(s) for which this application is made.

Subscribed and sworn to before me this [redacted] *day of* [redacted], 19[redacted]

[SIGN HERE] [redacted]

Notary Public in and for the County and State aforesaid.
or [redacted]

The application shall be signed by the applicant. In the case of a partnership the application shall be signed by each of the partners, and in the case of a corporation by an officer and under the seal of the corporation.

[redacted]

Mr. Woodward: Call Mr. Cameron.

GEORGE CAMERON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Woodward:

Q. State your name, please.

A. George Cameron.

Q. Mr. Cameron, where do you live?

A. In Sacramento.

Mr. McGilvray: I didn't get the address.

Mr. Woodward: Sacramento.

Mr. McGilvray: Sacramento.

Q. (By Mr. Woodward): Would you give us your home [3] address, please?

A. 1167 Fourth Avenue.

Q. What is your occupation?

A. I am a supervisor of the State Department of Public Health, Bureau of Vital Statistics.

Q. In response to our subpoena did you bring certain birth and death certificates with you?

A. I did, yes.

Q. May I have those, please?

(Documents handed to counsel.)

Mr. McGilvray: Your Honor, I would stipulate on the part of the defense that these photostats are true and correct copies of the records, and the photostats may be introduced in evidence so they

(Testimony of George Cameron.)

can go back to the State Department of Public Health.

The Court: Is that the purpose of calling this witness, Mr. Woodward?

Mr. Woodward: The purpose of calling this witness was merely to establish the identity of the documents, that they are official records of the State of California, Bureau of Vital Statistics, and these are the originals.

The Court: And the others are photostatic copies?

Mr. Woodward: And the others are exact photostatic copies of the originals.

The Court: All right. Under the stipulation, then, [4] is there any objection to their being received in evidence?

Mr. McGilvray: There is no objection. This witness would not know the facts of them except that they are official records.

Mr. Woodward: That is right.

The Court: Then government's Exhibit 2 in evidence will be the birth certificate of Donald Harold Wahyou.

Mr. Woodward: And the birth date is November 30, 1917.

Mr. McGilvray: What is the date, Mr. Woodward?

Mr. Woodward: November 30, 1917.

Mr. McGilvray: And the place?

Mr. Woodward: And the place is Drytown, California.

(Testimony of George Cameron.)

The Witness: Sacramento, I believe. Up in the left corner, left top corner.

Mr. Woodward: Maybe we'd better let you interpret this. Then we won't have it wrong.

The Witness: The place of birth is in the city of Sacramento.

Q. (By Mr. Woodward): And the address?

A. 1924 K Street.

Mr. Woodward: All right. Then may that be Government's Exhibit 2, your Honor?

The Court: Yes. That will be received as Exhibit No. 2.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 2.) [5]

Q. (By Mr. Woodward): Then regarding the death certificate of Donald H. Wahyou, would you tell us what that indicates as the date of death and the place of death?

A. He died in Jackson, Amador County, November 18, 1918.

The Court: Would you give that to me again, please?

A. November 18, 1918.

Mr. McGilvray: That was Amador County?

A. Amador County, city of Jackson.

Mr. McGilvray: Jackson.

Q. (By Mr. Woodward): Could you give us the age at that time?

A. His age at that time was 11 months, 15 days.

(Testimony of George Cameron.)

Mr. Woodward: May this death certificate, then, be introduced as Government's exhibit in order?

The Court: Yes. It will be received as Exhibit No. 3.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 3.)

Mr. Woodward: You may cross-examine.

Mr. McGilvray: No questions, your Honor.

Mr. Woodward: I will return the original documents to the witness.

The Court: Yes. The record will show that you have your originals back. Thank you very much, Mr. Cameron.

Mr. Woodward: Thank you very much, Mr. Cameron. Mr. [6] Anderson.

ROY R. ANDERSON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Your name, sir.

A. Roy Anderson.

The Clerk: Will you take the witness stand, please.

The Court: That is Roy R. Anderson?

A. Yes, sir, Roy R. Anderson.

Direct Examination

By Mr. Woodward:

Q. Where do you live?

A. I live at 818 - 34th Street, in Richmond, California.

(Testimony of Roy R. Anderson.)

Q. And what is your occupation?

A. I am an investigator with the United States Immigration and Naturalization Service in San Francisco.

Q. Is San Francisco your official place of business? A. Yes, sir.

Q. Now, in the course of—by the way, how long have you been employed as an investigator for the Department?

A. I have been with the Service for—since 1941, but as an investigator since 1951, I believe.

Q. Now, in the course of your duties have you had occasion to meet Donald Wahyou?

A. Yes, sir, I have. [7]

Q. Do you recognize him as being here in the courtroom? A. Yes, sir.

Q. Will you identify him, please?

A. He is the gentleman sitting at the end of the counsel table.

Mr. Woodward: May the record show that the witness has identified the defendant?

The Court: Yes, the record will so show.

Q. (By Mr. Woodward): Now, did you have an occasion in the course of your duties to do some investigative work concerning the defendant?

A. Yes, sir.

Q. Now, would you tell us when you began your investigation?

A. I first started the investigation of his case in the early part of 1953.

(Testimony of Roy R. Anderson.)

Q. Were you requested to make an investigation? A. Yes, sir.

Q. And you did so? A. Yes, sir.

Q. Now, will you tell us what you did right from the beginning of your investigation?

A. We had received information through our Stockton office, that is, the Immigration Office in Stockton, that there was a certain Chinese man in Stockton known as Sam [8] Wahyou who had claimed to be a native-born citizen of the United States who actually was not born in the United States but was born in China and had come to this country about 1929 as a merchant's son. And so I went down later on when I got a chance to talk to this man. Well, first, of course, we always, when we get a letter or any information, we try to find out if we have any Immigration records on the people that they tell us about. And they had given the name of Jue Bing Cue as the real name of this man.

Mr. McGilvray: Could we get the spelling of that?

A. They had spelled it in this letter J-u-e B-i-n-g C-u-e, and that was the name that was given as his true name. And so, of course, I searched our index records in San Francisco for a file under that name, and I came up with one under the name of Chow, C-h-o-w, Bing Kew, and this file indicated that the subject of the file had entered the United States as a merchant's son in 1929, and his destination was Stockton. So I thought perhaps

(Testimony of Roy R. Anderson.)

that would be the file that related to this man that we had received the information on. So the next time I had occasion to be in Stockton I went to the address that was given for Sam Wahyou, which was the Centro-Market, and I located him there.

Q. (By Mr. Woodward): Well, before you get into that, you mentioned something about a file of arrival, is that correct? [9] A. Yes.

Q. What is your correct name for that?

A. Well, an arrival file on a Chinese merchant, or in this case merchant's son. That is an indication that he entered this country as an alien son of a resident merchant. It is not a citizenship file at all; it is simply an arrival record of an alien to this country.

Q. And you say you found a file of Chow Bing Kew? A. Yes, sir.

Q. All right. Do you have that file with you?

A. Yes, we have it here.

Mr. McGilvray: Could I have about two minutes to look this document over, your Honor?

The Court: Yes.

Mr. McGilvray: All right, Mr. Woodward.

Q. (By Mr. Woodward): I will hand you what appears to be a file; is that the file you mentioned to us? A. Yes, this is the one that I found.

Q. Now, as part of that file is there an application for entry?

A. Yes, there is. The first document that usually comes to the attention of the Service is an affidavit which is executed by the father of the applicant on

(Testimony of Roy R. Anderson.)

behalf of the applicant to show who he is and that they are father and son, and that bears the photograph of the father and the son. [10]

Q. Now, that would be the first document that would normally appear in your file? A. Yes.

Q. Do you find such an affidavit in this particular file?

A. Yes, there is one. That is the first document in the file.

Q. Would you be good enough to remove that? Is it all right with you to do that? And while we are on that, are these documents that we are discussing now in this application, are they accepted as part of the officials records of the Immigration and Naturalization Service?

A. Yes, these are the official records. I don't know as I would have any authority to open them.

Q. Well, we will need them here, and, of course, the Department will get them back. But this is part of the official file? A. Yes.

Q. And these records are under your control and custody? A. Yes, sir.

Q. And they were brought here to court by yourself? A. Yes.

Mr. Woodward: May the affidavit of Chow Shun sworn to the 21st day of June, 1928, be introduced as Government's next in order? [11]

The Court: Any objection?

Mr. McGilvray: No objection, your Honor.

The Court: It will be received as Exhibit No. 4.

(Testimony of Roy R. Anderson.)

(The document referred to was received in evidence as Plaintiff's Exhibit No. 4.)

Q. (By Mr. Woodward): In the normal course of such an application for entry what is the next step that is taken by the applicant or the applicant's father?

A. Well, of course, they come to the United States and make their application for admission with the Immigration Service and there the father usually appears as a witness to give any testimony that is necessary before the officers of the Immigration Service in order for the Service to determine whether or not this relationship exists and whether the son is entitled to enter the United States under the status which he is claiming.

Q. Now, in the course of that transaction is there any documentary evidence that is produced by either the applicant or the applicant's father?

A. Well, in this particular case, and many others like it, there are oftentimes affidavits from other friends and relatives. There is one of them in here from some witness similar to the one prepared by his father. And then, of course, there is testimony taken from the applicant and from the father and other witnesses, and there are copies of [12] testimony in the file. There are no pictures on those, however. Then the next thing that is done in connection with the application for admission, when it is decided that he is admissible, and the Immigration Service does admit him, then they issue

(Testimony of Roy R. Anderson.)

what we call a Certificate of Identity so he will have something to carry to show that he has been carried through the Immigration. And in connection with that there is an application form filled out to which a photograph is attached, and, of course, similar or the same photograph is also placed on the copy which is given to him of the Certificate of Identity. That is this document here and that is the application for the certificate.

Q. Would we be correct in assuming that the application for the Certificate of Identity is practically the last step of a person entering as a merchant's son? A. Yes, that is the last.

Q. Does the file that you have have that type of application?

A. Yes, it has that. It has the application bearing the photograph.

Q. Yes. May we have that? Now, would this indicate that the application and receipt for Certificate of Identity were made, that the Certificate was granted and that the receipt was signed; would that be correct?

A. Yes, that is what that is. It shows that he signed [13] for the Certificate of Identity which was issued to him.

Q. Yes. This is the original application that I show you? A. Yes.

Mr. Woodward: If the Court please, may I introduce as Government's next in order application and receipt for Certificate of Identity dated May 20, 1929, and signed Chow Bing Kew?

(Testimony of Roy R. Anderson.)

The Court: Yes. That will be received as Exhibit No. 5.

Mr. Woodward: Thank you.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 5.)

Q. (By Mr. Woodward): Then I take it, Mr. Anderson, that after you had perused this file we have just been discussing that you continued your investigation of Chow Bing Kew?

A. Yes, sir. That is when I went to Stockton to the address which we had been given for Sam Wahyou, and I—it is the Centro-Market there, and I found him there. And, of course, I told him who I was and the reason that I was there. Of course, I still wasn't absolutely positive that the man there would be the subject of this file that I had—I had it with me—but I told him I was there because we had received information that he was not a citizen of the United States. [14]

Q. May I interrupt you there? Will you tell us when you first saw Mr. Wahyou, where was that?

A. It was in his office in the store in Stockton.

Q. Do you remember when that was?

A. Yes. That was the date—I remember from my notes—it was April the 14th, 1953.

Q. Now, at that time and place do you recall if you had a conversation with Mr. Wahyou?

A. Yes, I did.

Q. All right. Who was present?

A. I went alone—I mean I took with me one of

(Testimony of Roy R. Anderson.)

the Service interpreters because I didn't know when I left San Francisco whether or not Mr. Wahyou would speak English. So the interpreter was with me. Just the two of us was there.

Q. I see.

Mr. McGilvray: I don't think that quite answers the question, your Honor. The question was, "Who was present?" and I assume that means who was present at the time the conversation took place. He said he took the interpreter. I don't believe he has answered the question.

The Court: Was the interpreter present at that time?

A. Yes, he was present during all the conversation that I had with Mr. Wahyou.

Q. (By Mr. Woodward): Do you recall the interpreter's name? [15] A. Walter Loo.

Q. Was there anyone else physically present at that time besides Mr. Loo, yourself and Mr. Wahyou?

A. No, just the three of us were in the room together.

Q. All right. Now, then, would you tell us to the best of your recollection what the conversation was between you and Mr. Wahyou?

A. Well, I told him that we had received information that he wasn't a citizen of the United States.

Q. Well, now, may I ask you one question there? Did you tell him who the "we" were?

A. Well, I had identified myself, and I don't know as I explained that we, the Immigration

(Testimony of Roy R. Anderson.)

Service, but as a representative of the Immigration Service——

Q. Did you identify yourself?

A. Yes, immediately, yes.

Q. Just tell us what was said.

The Court: We will get along a lot better if you try to think as best you can what you said and what he said and using the language as spoken. Will you try to do that?

A. Yes, sir.

The Court: Very well.

A. I will start over again. I told him that I had received information that he wasn't a citizen of the United States and I was there to check with him to find out. And [16] he said, "I am a citizen of the United States. I was born in Sacramento, California." And then he continued to say that I could verify it myself if I wanted, I could find the record in Sacramento. So in order to be able to locate the record and know it was his, why, I took out my pad and pencil and asked him for a little information to use, his own name. He said that his real name was Donald Harold Wahyou and he was known there, of course, as Sam Wahyou, and he gave me the date of his birth which was, I believe, July 7, 1914. I am not positive of that date. But—and he also told me the name of his father and the name of his mother. And so that is all the information I needed in order to check his birth record. And then he also volunteered that he had made a trip to China recently, and if I wanted I could

(Testimony of Roy R. Anderson.)

check with the State Department and I would find they had issued a United States passport to him. And then he gave me the date he had departed from the United States and the date he had returned, and said also that he had traveled under the name of Donald Harold Wahyou, which was his true name. Now that is all—about all the conversation that took place there, and I left to check out the information which he had given me. And I—later on I came to Sacramento to see if there was a birth record on the man, and Mr. Cameron, the gentleman who was here before me, went to the birth records bureau and did find a birth record on a Donald Harold Wahyou. And [17] so then I checked if there was a possibility that he might be using someone's birth certificate, the birth certificate of a person who had died. So I started with the date of birth shown on the birth record to check death records, and then I found a death record on Donald Harold Wahyou showing the same date of birth as he had given me, and also the father and mother. And it was obvious then that that is what——

Mr. McGilvray: I move that the words "obvious then" go out.

The Court: Yes, that will be stricken and disregarded.

A. It appeared——

Mr. McGilvray: I move that that statement go out.

The Court: Just state what you saw.

(Testimony of Roy R. Anderson.)

A. Well, I have already stated that.

The Court: I think you have.

Q. (By Mr. Woodward): Well, then, would you just tell us what you did next?

A. Well, now, with the information that I had, I thought—I had issued a warrant for his arrest. Oh, incidentally, after I had talked to him, then I was reasonably sure that——

Mr. McGilvray: Move that "reasonably sure" go out, your Honor.

The Court: Yes. Just state the facts and [18] the conversation.

A. I examined this arrival file which I had, and with the arrival file, the information there which seemed to relate to him, why, I was able to get a warrant of arrest. So then the next step was to go to Stockton to serve the warrant of arrest.

Q. (By Mr. Woodward): Now, let me interrupt you there. Did you investigate the passport applications that Mr. Wahyou suggested that you investigate?

A. Oh, yes. I contacted our San Francisco office of the Department of State and asked for their file, which they sent to Washington and got for me and sent it—I had that in a very few days. Then that file bore out what he had told me, that he applied for a passport and had used it.

Q. Now, you have stated that you did investigate the passport? A. Yes.

Q. And that you obtained the application?

A. Yes.

(Testimony of Roy R. Anderson.)

Q. Is this the application that you obtained from the file from the Department?

A. Yes, this is the one.

Mr. Woodward: If the Court please, then we would like to introduce only the passport application which consists of two pages. The applicant is Donald Harold Wahyou, also known [19] as Sam Wahyou, and it says that he solemnly swears that he was born at Sacramento, California, on July 7, 1914, and gives his address. And the document was sworn to the 3rd day of March, 1947, before R. E. Graham, Clerk of the Superior Court, at Stockton, California, by Ben Scantlehev—it looks like. I can't quite make it out. And we want to leave the file intact, but we are seeking to introduce only the application, your Honor.

The Court: Any objection?

Mr. McGilvray: No, your Honor.

The Court: Then the application for passport will be received as Exhibit No. 6.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 6.)

(By Mr. Woodward): Now, then, Mr. Anderson, you were about to say that you did something further in your investigation; would you tell us what that was?

A. Well, the next step would be when I got the warrant of arrest.

Q. Yes.

(Testimony of Roy R. Anderson.)

A. And went to Stockton to serve it on Mr. Wahyou.

Q. Now, do you recall when that was?

A. That was on June the 13th, 1953.

Q. Then did you go to Stockton?

A. Yes. [20]

Q. And did you have any further conversation with Mr. Wahyou at that time?

A. Yes, I did.

Q. Will you tell us where that was?

A. That took place in the same office in his store in Stockton.

Q. And who was present at that time and place?

A. An investigator by the name of George Heckert from our office in San Francisco, and then there was another investigator by the name of Yarbrough from our New York office who happened to be on detail in San Francisco at the time and went with us. And so the three of us—and Mr. Wahyou—were present during all of the conversation. And then, of course, before Mr. Wahyou would talk to us very much he wanted his attorney present, so he called his attorney and we didn't talk any more about our case until Mr. Macomber came to the office. So then from that point on, there were the five of us present at all times.

Q. Now, during that period of time when five of you were present did you have a conversation concerning the case or the citizenship of Mr. Wahyou? A. Yes, we did.

Q. All right. Would you briefly tell us to the

(Testimony of Roy R. Anderson.)

best of your recollection what the conversation was?

A. Well, we started in almost immediately. [21] First I talked to Mr. Macomber and gave him an idea of what I had. I told him about the birth certificate, about the arrival file, and then, of course, he wanted to talk with his client for a few minutes, which he did. Then we came back and he said that Mr. Wahyou was ready to make any kind of statement "that you like" and from that point on the proceedings turned into a question and answer form of a statement which we recorded on a dictaphone machine, and then that was a sworn statement, the usual kind we take, swearing them in, asking his name, true name, all the names he has been known by, and place of birth. And then we have all of that as a matter of record now.

Q. Then that was recorded? A. Yes.

Q. Was that later transcribed into typing?

A. Yes, it was typed and he was given an opportunity to read it and he signed—he initialed each page of the typed statement and signed the last page of it.

Mr. Woodward: May we have just a moment, your Honor?

The Court: Yes.

Mr. McGilvray: We have no objection to the introduction of this document in evidence, your Honor.

The Court: Very well.

Mr. Woodward: It would probably save time,

(Testimony of Roy R. Anderson.)

your Honor, instead of going into it, if we introduced the written [22] statement.

The Court: Yes. It will be received as Exhibit No. 7.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 7.)

Q. (By Mr. Woodward): Then since the conversation was reduced to writing as you have already said and that is now Exhibit No. 7, did that conclude your conversations had that day?

A. Well, yes. He had identified the photographs in our Chinese arrival file as his file and given us his true name, and so that was all there was to it then.

Q. Now, after the formal signed statement was signed and made, did Mr. Wahyou have any further conversation that you recall?

A. Well, of course, there was a matter of what to do about taking him into custody. He didn't—he didn't want to go to San Francisco with us because of his business and certain commitments that he had made, and so then there was further conversation about releasing him under bond without taking him into San Francisco under the warrant of arrest, and we arranged before we left Stockton that rather than go with us he could post a bond right there and then appear at a later date when it was more convenient for him.

Q. Now, do you recall anything further at that time?

(Testimony of Roy R. Anderson.)

A. No. I think that it all there was. [23]

Q. All right. Now, did you cause a search to be made in Washington concerning whether or not there was any naturalization proceedings by either Donald Harold Wahyou or Chow Bing Kew or Sam Wahyou?

A. Yes. We do that in cases of this type. First we start out by making a thorough search of our local indices which I think, myself, I did that several times during the course of this investigation. I was positive that I had all of the records that related to him under all of the names that appeared in San Francisco and there was nothing concerning his naturalization there. But in order to make sure, we always ask our Central Office in Washington to search their files because if there is—if anyone is naturalized anywhere in the United States, their records are so indicated there; since 1906 they have received in our Central Office a record of any naturalization anywhere in the United States. So if he had been naturalized, there would be a record there. And they sent out a certificate showing there was no record of naturalization under any of the names.

Q. And such a certification was sent to you by that office? A. Yes, we got that.

Q. Is this the document that was forwarded to you? A. Yes, this is it.

Mr. Woodward: If your Honor please, I move to introduce [24] in evidence as government's next in order the certification of the Department of Justice, Immigration and Naturalization Service, an

(Testimony of Roy R. Anderson.)

order dated May 26, 1955, in which they certify that no record whatsoever evidencing United States citizenship of a person by the name of Chow Bing Kew, alias Chew Bing Kew, alias Donald Harold Wahyou, alias Sam Wahyou, exists in the Central Office of the Immigration and Naturalization Service.

The Court: Any objection?

Mr. McGilvray: No objection, your Honor.

The Court: Very well. The search certificate will be received in evidence as No. 8.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 8.)

Mr. Woodward: You may cross-examine.

Cross-Examination

By Mr. McGilvray:

Q. What did you do before you became an investigator for the Department, sir?

A. I was an Immigration inspector; started as an Immigrant Inspector in Detroit, Michigan, with the Immigration Service.

Q. Where was that?

A. In Detroit, Michigan.

Q. When? A. I started in 1921. [25]

Q. What did you do before 1921, sir?

A. I was an accountant for the International Harvester Company in Chicago.

Q. How long were you with them?

A. Five years, sir.

Q. Before that?

(Testimony of Roy R. Anderson.)

A. Well, I was going to college most of the time before that; a few little odd jobs.

Q. Which college did you go to, sir?

A. I went to Illinois College in Jacksonville, Illinois, and also the University of Illinois.

Q. Do you have a degree from either of those?

A. Yes. I have a degree from Illinois College, an AB degree.

Q. Do you have any other degrees?

A. No, sir.

Q. You referred to your file that you had gotten some information of Mr. Wahyou some time the early part of 1953. Can you give me the date that you got that letter of instructions or letter of inquiry from the Stockton office?

A. Well, offhand——

Q. Would you refer to your file, sir?

A. I think I can. It might not be in what I have here, but the original letter would be in the files which Mr. Knesek has. [26]

Q. Would you examine those files to get that date?

A. I think I may have it in a report right here that I wrote on this. Oh. This letter showed that it was on February 16, 1951, that they received the original information.

Q. Your San Francisco office?

A. No. The San Francisco office, I would have to refer to that, the letter which is in there. It would be right toward the bottom, I think, of the file from our Stockton office. May 21, 1951.

(Testimony of Roy R. Anderson.)

Q. May 21, 1951, is that right?

A. Yes, sir.

Q. In other words, your San Francisco office was informed by your Stockton office May 21, 1951?

A. Yes, sir.

Q. About this matter; is that right?

A. Yes, sir.

Q. And do I understand you correctly that the first time you ever talked to Mr. Wahyou was April 14, 1953? A. Yes, sir.

Q. Now, when did you get the file?

A. I don't know the exact date, but I would estimate it was two to three weeks before I talked to him.

Q. In other words, two or three weeks before April 14, 1953, you had seen the file for the first time yourself? A. Yes, sir. [27]

Q. Did you know anything about the file before then? A. No, sir.

Q. Had you known Mr. Wahyou or the defendant in this matter before that time?

A. No, sir.

Q. Do you know what happened between May 21, 1951, when you received the inquiry or information and two years later in April of 1953, do you know what intervened during that period of time?

A. No, sir; I don't, sir. We have quite a backlog of such cases, but I didn't come into the Chinese work myself until just shortly before the date that I got this, and so this may have been in the hands of other investigators. I don't know a thing about

(Testimony of Roy R. Anderson.)

it. I know that they assigned it to me just shortly before I went to work on it.

Q. Did you have a letter of instructions from someone to go to work on it?

A. No. We are just assigned a number of cases to work on as we see fit.

Q. Who gave you this assignment?

Mr. Woodward: If your Honor please, I think that is all immaterial; object to it on that ground.

The Court: It was brought out on direct examination. I will allow it.

A. My supervisory officer gave the file to me and [28] assigned it to me.

Q. (By Mr. McGilvray): What is his name?

A. At that time it was George Heckert.

Q. Did Mr. Barber have anything to do with it?

A. Mr. Barber is our District Director. He doesn't have anything to do directly with the assignments of files in case work. That is, that authority is delegated to his various supervisors of the divisions.

Q. Well, did he have anything to do with this case; did he talk to you about it? A. No, sir.

Q. Just Mr. Heckert, is that right?

A. That is all, yes, sir.

Q. Now, you had this file with you, then, when you went to Stockton on April 14th, didn't you?

A. Yes.

Q. And you had reviewed the file?

A. Yes, sir.

Q. And the file that you have referred to, that

(Testimony of Roy R. Anderson.)

you now have, and not the one that counsel has, is that the only file that you had at that time, or did you have more?

A. I had the file on the father of Chow Bing Kew. That is all. Just those two files.

Q. Did your examination of the file reveal any investigation by other investigators of the Department prior [29] to April 14th, or the time you got the file, say, two weeks before that date of 1953?

A. No, sir.

Q. In other words, no one had worked this case at all? A. No, they hadn't.

Q. What?

A. No. Oh, there was in this letter that we got from Stockton——

Q. Yes?

A. ——there was some mention in there—I don't recall just what it said, but the Stockton investigator said they were acquainted with this man and told us who he was, this Sam Wahyou. He said that, "He is the president of the Daylite Meat Company," or some such statement as that was in the letter. They were acquainted with him down there.

Q. Do you have the letter with you, sir?

A. It is in the file.

Mr. McGilvray: Could I see it, counsel, then?

Mr. Woodward: I don't see any materiality to it, your Honor, what the source of the information was or who it came from or how. I think it is very immaterial. Object to it on that ground.

(Testimony of Roy R. Anderson.)

The Court: I will allow the question or if you wish the examination of the letter.

Mr. McGilvray: I would like to examine the letter. [30]

The Court: Yes.

Mr. Woodward: You are familiar with the file. Would you show us the letter?

A. Yes. This is the one that we were looking at, yes, and then, of course, the forwarding letter is this one here from the Officer-in-Charge.

Q. (By Mr. McGilvray): You have read this memorandum, sir?

A. Yes. It may be some time since I read it.

Q. Have you examined this file, sir, that I have in my hands? A. Yes.

Q. Did you examine this file in 1953 prior to April 14th?

A. Oh, yes, prior to April 14th.

Q. Do you mean to tell me now, sir, that the Department had not investigated this subject prior to the time that you took it two weeks prior to April 14th?

A. Just what our officers in Stockton did with it——

Q. No, I didn't ask that. I asked, do you mean to tell me that the Immigration Department had not been investigating this defendant prior to the time that you came on the case?

A. As far as I know they didn't.

Q. The information in this is marked "Highly Confidential." Do you mean to tell me that the

(Testimony of Roy R. Anderson.)

Department of Immigration and Naturalization did not do some investigating of the [31] defendant prior to the time you were assigned to the case?

Mr. Woodward: I will object to that——

Q. (By Mr. McGilvray): Could you examine this file and tell the Court, please, and us, if the Department did not do some investigating of the defendant prior to the time you got the assignment?

Mr. Woodward: I will object to that on the ground it is immaterial if they investigated it from the Year 1.

The Court: I will allow the question, if you know.

A. Well, all I know, actually, about the file in the case is what I did on it from the time——

Q. (By Mr. McGilvray): But you told me you read the file. A. Yes.

Q. You told me, also, before that no one had worked on this case for two years after receipt of this information; I am now asking you, in your examination of the file, was nothing done to investigate that confidential memorandum for over two years, or almost two years, by anyone?

A. No, I didn't say that no one had worked on it because I don't really know.

Q. Well, does your file disclose if anyone worked on it?

A. I couldn't see anything in there except some——

Q. Would you examine the file?

(Testimony of Roy R. Anderson.)

Q. Is this the application that you obtained from the file from the Department?

A. Yes, this is the one.

Mr. Woodward: If the Court please, then we would like to introduce only the passport application which consists of two pages. The applicant is Donald Harold Wahyou, also known [19] as Sam Wahyou, and it says that he solemnly swears that he was born at Sacramento, California, on July 7, 1914, and gives his address. And the document was sworn to the 3rd day of March, 1947, before R. E. Graham, Clerk of the Superior Court, at Stockton, California, by Ben Scantlehey—it looks like. I can't quite make it out. And we want to leave the file intact, but we are seeking to introduce only the application, your Honor.

The Court: Any objection?

Mr. McGilvray: No, your Honor.

The Court: Then the application for passport will be received as Exhibit No. 6.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 6.)

Q. (By Mr. Woodward): Now, then, Mr. Anderson, you were about to say that you did something further in your investigation; would you tell us what that was?

A. Well, the next step would be when I got the warrant of arrest.

Q. Yes.

(Testimony of Roy R. Anderson.)

A. And went to Stockton to serve it on Mr. Wahyou.

Q. Now, do you recall when that was?

A. That was on June the 13th, 1953.

Q. Then did you go to Stockton?

A. Yes. [20]

Q. And did you have any further conversation with Mr. Wahyou at that time?

A. Yes, I did.

Q. Will you tell us where that was?

A. That took place in the same office in his store in Stockton.

Q. And who was present at that time and place?

A. An investigator by the name of George Heckert from our office in San Francisco, and then there was another investigator by the name of Yarbrough from our New York office who happened to be on detail in San Francisco at the time and went with us. And so the three of us—and Mr. Wahyou—were present during all of the conversation. And then, of course, before Mr. Wahyou would talk to us very much he wanted his attorney present, so he called his attorney and we didn't talk any more about our case until Mr. Macomber came to the office. So then from that point on, there were the five of us present at all times.

Q. Now, during that period of time when five of you were present did you have a conversation concerning the case or the citizenship of Mr. Wahyou? A. Yes, we did.

Q. All right. Would you briefly tell us to the

(Testimony of Roy R. Anderson.)

best of your recollection what the conversation was?

A. Well, we started in almost immediately. [21] First I talked to Mr. Macomber and gave him an idea of what I had. I told him about the birth certificate, about the arrival file, and then, of course, he wanted to talk with his client for a few minutes, which he did. Then we came back and he said that Mr. Wahyou was ready to make any kind of statement "that you like" and from that point on the proceedings turned into a question and answer form of a statement which we recorded on a dictaphone machine, and then that was a sworn statement, the usual kind we take, swearing them in, asking his name, true name, all the names he has been known by, and place of birth. And then we have all of that as a matter of record now.

Q. Then that was recorded? A. Yes.

Q. Was that later transcribed into typing?

A. Yes, it was typed and he was given an opportunity to read it and he signed—he initialed each page of the typed statement and signed the last page of it.

Mr. Woodward: May we have just a moment, your Honor?

The Court: Yes.

Mr. McGilvray: We have no objection to the introduction of this document in evidence, your Honor.

The Court: Very well.

Mr. Woodward: It would probably save time,

(Testimony of Roy R. Anderson.)

your Honor, instead of going into it, if we introduced the written [22] statement.

The Court: Yes. It will be received as Exhibit No. 7.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 7.)

Q. (By Mr. Woodward): Then since the conversation was reduced to writing as you have already said and that is now Exhibit No. 7, did that conclude your conversations had that day?

A. Well, yes. He had identified the photographs in our Chinese arrival file as his file and given us his true name, and so that was all there was to it then.

Q. Now, after the formal signed statement was signed and made, did Mr. Wahyou have any further conversation that you recall?

A. Well, of course, there was a matter of what to do about taking him into custody. He didn't—he didn't want to go to San Francisco with us because of his business and certain commitments that he had made, and so then there was further conversation about releasing him under bond without taking him into San Francisco under the warrant of arrest, and we arranged before we left Stockton that rather than go with us he could post a bond right there and then appear at a later date when it was more convenient for him.

Q. Now, do you recall anything further at that time?

(Testimony of Roy R. Anderson.)

A. No. I think that it all there was. [23]

Q. All right. Now, did you cause a search to be made in Washington concerning whether or not there was any naturalization proceedings by either Donald Harold Wahyou or Chow Bing Kew or Sam Wahyou?

A. Yes. We do that in cases of this type. First we start out by making a thorough search of our local indices which I think, myself, I did that several times during the course of this investigation. I was positive that I had all of the records that related to him under all of the names that appeared in San Francisco and there was nothing concerning his naturalization there. But in order to make sure, we always ask our Central Office in Washington to search their files because if there is—if anyone is naturalized anywhere in the United States, their records are so indicated there; since 1906 they have received in our Central Office a record of any naturalization anywhere in the United States. So if he had been naturalized, there would be a record there. And they sent out a certificate showing there was no record of naturalization under any of the names.

Q. And such a certification was sent to you by that office? A. Yes, we got that.

Q. Is this the document that was forwarded to you? A. Yes, this is it.

Mr. Woodward: If your Honor please, I move to introduce [24] in evidence as government's next in order the certification of the Department of Justice, Immigration and Naturalization Service, an

(Testimony of Roy R. Anderson.)

order dated May 26, 1955, in which they certify that no record whatsoever evidencing United States citizenship of a person by the name of Chow Bing Kew, alias Chew Bing Kew, alias Donald Harold Wahyou, alias Sam Wahyou, exists in the Central Office of the Immigration and Naturalization Service.

The Court: Any objection?

Mr. McGilvray: No objection, your Honor.

The Court: Very well. The search certificate will be received in evidence as No. 8.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 8.)

Mr. Woodward: You may cross-examine.

Cross-Examination

By Mr. McGilvray:

Q. What did you do before you became an investigator for the Department, sir?

A. I was an Immigration inspector; started as an Immigrant Inspector in Detroit, Michigan, with the Immigration Service.

Q. Where was that?

A. In Detroit, Michigan.

Q. When? A. I started in 1921. [25]

Q. What did you do before 1921, sir?

A. I was an accountant for the International Harvester Company in Chicago.

Q. How long were you with them?

A. Five years, sir.

Q. Before that?

(Testimony of Roy R. Anderson.)

A. Well, I was going to college most of the time before that; a few little odd jobs.

Q. Which college did you go to, sir?

A. I went to Illinois College in Jacksonville, Illinois, and also the University of Illinois.

Q. Do you have a degree from either of those?

A. Yes. I have a degree from Illinois College, an AB degree.

Q. Do you have any other degrees?

A. No, sir.

Q. You referred to your file that you had gotten some information of Mr. Wahyou some time the early part of 1953. Can you give me the date that you got that letter of instructions or letter of inquiry from the Stockton office?

A. Well, offhand——

Q. Would you refer to your file, sir?

A. I think I can. It might not be in what I have here, but the original letter would be in the files which Mr. Knesek has. [26]

Q. Would you examine those files to get that date?

A. I think I may have it in a report right here that I wrote on this. Oh. This letter showed that it was on February 16, 1951, that they received the original information.

Q. Your San Francisco office?

A. No. The San Francisco office, I would have to refer to that, the letter which is in there. It would be right toward the bottom, I think, of the file from our Stockton office. May 21, 1951.

(Testimony of Roy R. Anderson.)

Q. May 21, 1951, is that right?

A. Yes, sir.

Q. In other words, your San Francisco office was informed by your Stockton office May 21, 1951?

A. Yes, sir.

Q. About this matter; is that right?

A. Yes, sir.

Q. And do I understand you correctly that the first time you ever talked to Mr. Wahyou was April 14, 1953? A. Yes, sir.

Q. Now, when did you get the file?

A. I don't know the exact date, but I would estimate it was two to three weeks before I talked to him.

Q. In other words, two or three weeks before April 14, 1953, you had seen the file for the first time yourself? A. Yes, sir. [27]

Q. Did you know anything about the file before then? A. No, sir.

Q. Had you known Mr. Wahyou or the defendant in this matter before that time?

A. No, sir.

Q. Do you know what happened between May 21, 1951, when you received the inquiry or information and two years later in April of 1953, do you know what intervened during that period of time?

A. No, sir; I don't, sir. We have quite a backlog of such cases, but I didn't come into the Chinese work myself until just shortly before the date that I got this, and so this may have been in the hands of other investigators. I don't know a thing about

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it. I know that they assigned it to me just shortly before I went to work on it.

Q. Did you have a letter of instructions from someone to go to work on it?

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Q. Who gave you this assignment?

Mr. Woodward: If your Honor please, I think that is all immaterial; object to it on that ground.

The Court: It was brought out on direct examination. I will allow it.

A. My supervisory officer gave the file to me and [28] assigned it to me.

Q. (By Mr. McGilvray): What is his name?

A. At that time it was George Heckert.

Q. Did Mr. Barber have anything to do with it?

A. Mr. Barber is our District Director. He doesn't have anything to do directly with the assignments of files in case work. That is, that authority is delegated to his various supervisors of the divisions.

Q. Well, did he have anything to do with this case: did he talk to you about it? A. No, sir.

Q. Just Mr. Heckert, is that right?

A. That is all, yes, sir.

Q. Now, you had this file with you, then, when you went to Stockton on April 14th, didn't you?

A. Yes.

Q. And you had reviewed the file?

A. Yes, sir.

Q. And the file that you have referred to, that

(Testimony of Roy R. Anderson.)

you now have, and not the one that counsel has, is that the only file that you had at that time, or did you have more?

A. I had the file on the father of Chow Bing Kew. That is all. Just those two files.

Q. Did your examination of the file reveal any investigation by other investigators of the Department prior [29] to April 14th, or the time you got the file, say, two weeks before that date of 1953?

A. No, sir.

Q. In other words, no one had worked this case at all? A. No, they hadn't.

Q. What?

A. No. Oh, there was in this letter that we got from Stockton——

Q. Yes?

A. ——there was some mention in there—I don't recall just what it said, but the Stockton investigator said they were acquainted with this man and told us who he was, this Sam Wahyou. He said that, "He is the president of the Daylite Meat Company," or some such statement as that was in the letter. They were acquainted with him down there.

Q. Do you have the letter with you, sir?

A. It is in the file.

Mr. McGilvray: Could I see it, counsel, then?

Mr. Woodward: I don't see any materiality to it, your Honor, what the source of the information was or who it came from or how. I think it is very immaterial. Object to it on that ground.

(Testimony of Roy R. Anderson.)

The Court: I will allow the question or if you wish the examination of the letter.

Mr. McGilvray: I would like to examine the letter. [30]

The Court: Yes.

Mr. Woodward: You are familiar with the file. Would you show us the letter?

A. Yes. This is the one that we were looking at, yes, and then, of course, the forwarding letter is this one here from the Officer-in-Charge.

Q. (By Mr. McGilvray): You have read this memorandum, sir?

A. Yes. It may be some time since I read it.

Q. Have you examined this file, sir, that I have in my hands? A. Yes.

Q. Did you examine this file in 1953 prior to April 14th?

A. Oh, yes, prior to April 14th.

Q. Do you mean to tell me now, sir, that the Department had not investigated this subject prior to the time that you took it two weeks prior to April 14th?

A. Just what our officers in Stockton did with it——

Q. No, I didn't ask that. I asked, do you mean to tell me that the Immigration Department had not been investigating this defendant prior to the time that you came on the case?

A. As far as I know they didn't.

Q. The information in this is marked "Highly Confidential." Do you mean to tell me that the

(Testimony of Roy R. Anderson.)

Department of Immigration and Naturalization did not do some investigating of the [31] defendant prior to the time you were assigned to the case?

Mr. Woodward: I will object to that——

Q. (By Mr. McGilvray): Could you examine this file and tell the Court, please, and us, if the Department did not do some investigating of the defendant prior to the time you got the assignment?

Mr. Woodward: I will object to that on the ground it is immaterial if they investigated it from the Year 1.

The Court: I will allow the question, if you know.

A. Well, all I know, actually, about the file in the case is what I did on it from the time——

Q. (By Mr. McGilvray): But you told me you read the file. A. Yes.

Q. You told me, also, before that no one had worked on this case for two years after receipt of this information: I am now asking you, in your examination of the file, was nothing done to investigate that confidential memorandum for over two years, or almost two years, by anyone?

A. No, I didn't say that no one had worked on it because I don't really know.

Q. Well, does your file disclose if anyone worked on it?

A. I couldn't see anything in there except some——

Q. Would you examine the file?

(Testimony of Roy R. Anderson.)

I think it will take ten minutes. May we take a recess at this time, your Honor? [32]

The Court: Yes. We will take a ten-minute recess.

(Recess.)

Q. (By Mr. McGilvray): We stopped, sir, when I asked you to look your file over that had been examined or was in the hands of Mr. Knesek, an you have done so now? A. Briefly, yes.

Q. Did you find any investigation by the Department from the date that you gave us in 1951 up until the time you got it in 1953?

A. From what I could see there apparently the Stockton office had done a little work on it, but about all there is is the letter that we mentioned before.

Q. So the other matters contained in the letter of a highly confidential nature you did nothing about at all, is that your answer, as far as you know, of the file in this case?

A. As far as I know. I don't know what was done on that.

Q. Now, when you were in Stockton on April 14th and saw Mr. Wahyou or the defendant, Chow Bing Kew, you said you showed him some identification or you identified yourself, is that right?

A. Yes, sir.

Q. What did you do in that regard?

A. His office is sort of in the back and you go by his secretary first, and, of course, she wants to

(Testimony of Roy R. Anderson.)

know who you [33] are and what your business is. And there I told her who I was and showed my identification.

Q. To whom, his secretary?

A. His secretary.

Q. What did you show her?

A. I showed her my identification card and badge.

Q. You hadn't seen him at this time?

A. No, sir.

Q. Do you still have the same identification and badge that you had at that time?

A. Well, it is the same identification card; however, we have a new folder since that time.

Q. But it was the usual Immigration identification?

A. Yes. I carry the card and the badge as a unit so that I show them both together.

Q. And then what happened?

A. Then she contacted him on the phone or intercom, whatever the communication system is, and he said, "Send him back." So I went back.

Q. So you went back? A. Yes, sir.

Q. Did anyone else go with you?

A. Walter Loo, the interpreter, went with me.

Q. Incidentally, is he still with the Department?

A. No. He is with the State Department now, sir. [34]

Q. Where is he now?

A. He is stationed over in Formosa.

(Testimony of Roy R. Anderson.)

Q. Is there any possibility that you met Mr. Wahyou on the floor of the market at Stockton?

A. No, sir.

Q. Now, his office, you say, is back of his secretary's office, is that it? A. Yes, sir.

Q. Is that on the ground floor?

A. No. You go up a stair. It is in a sort of a balcony like.

Q. I see. Now, Mr. Loo went with you and just the three of you were present? A. Yes, sir.

Q. You made some notes, you told me, that day?

A. Yes, sir.

Q. Do you have the notes, sir?

A. Well, I don't know as I have. I might.

Q. Could I see them, please?

A. I had a little yellow scratch pad. I made notes all along. I have what I wrote down that day.

Q. Could I see them, please? You have refreshed your recollection from those notes?

A. Yes.

Q. That is what I thought. [35]

A. This is what I wrote down in his office. I wrote this down later, but I wrote this (indicating).

Q. Is there anything on the other side of this sheet that I am looking at that pertains to your investigation that day or is this all?

A. I don't know what is on other side.

Q. Would you look at it? I don't want to invade the province of the Department on anything that is not pertinent to this defendant.

A. No. This is other notes on——

(Testimony of Roy R. Anderson.)

Q. Made that day?

A. No, not that day. No. These are notes that I made later on with what I had.

Q. You mean notes later on on the front of the page; is that right? A. Yes.

Q. Could I see that then? As I understand it, the document that you first showed me was the back piece of a yellow sheet; is that correct?

A. Yes.

Q. And then you showed me the first page of this and you tell me that you made these notes later on? A. Yes, sir.

Q. Well, then, is it possible that you made these notes that are on the back of this page later on, also? [36]

A. No. I made the notes right there in front of him.

Q. Could you tell me why you would do—I suppose this is the paper the Department furnishes you? A. Yes.

Q. Isn't this the first page ordinarily (indicating)? A. Yes.

Q. And it is on a pad, isn't it?

A. Yes, it is.

Q. And usually you tear them out?

A. Yes.

Q. Can you tell me why, then, you would write on the back page of your yellow pad first and then you would put the notes of your subsequent investigation ahead of it; can you explain that, please?

(Testimony of Roy R. Anderson.)

A. Well, I write on whichever side happens to be up. It doesn't make any difference.

Q. Let me ask you this: Had you torn this yellow sheet off your pad when you made these notes?

A. I used these—if there is a desk there, I tear off the sheet of paper and start making my notes, yes, sir.

Q. You are quite sure of that? Would you take this document out, please, then, of the file? Those are the only notes you made that day; is that right?

A. Just here (indicating).

Q. And this is the notes you made subsequently; is [37] that right? A. Yes, sir.

Q. Now, will you take it out of your file? Just take it out of your file. No. I wouldn't like to have it ripped out, sir. I think you ought to remove it. I beg your pardon, your Honor, I didn't mean that——

Mr. Woodward: May I see those?

Mr. McGilvray: Yes, surely. Could I identify this first?

Mr. Woodward: Sure.

Q. (By Mr. McGilvray): Would you now take your pencil and write on this "1" and on the side that you marked, if you will mark it "2" so there will be no question as to which page we are referring to, would you do that for me at this time and then sign your name and the date that you did it?

A. These other notes on the front there may have been notes that I made preparatory to—before

(Testimony of Roy R. Anderson.)

I went down. I don't remember what the sequence was.

Q. Surely. I will get to that. I will ask that the witness not volunteer, your Honor.

The Court: If you will just answer the questions it will be helpful.

Q. (By Mr. McGilvray): If you will mark on this in pencil and sign it on the right-hand corner on top, write "page 1" here and then sign it or just initials, if you wish, [38] then I can identify it for the purpose I wish to go into and so Mr. Woodward can also look at it—page 1—and then just put the date on it, if you will, 12-14-55, and the other side the same thing, if you will, "page 2" that would be.

Mr. Woodward wants to see this now.

Could I have this marked for identification, your Honor?

The Court: Yes, Exhibit A for identification.

Mr. McGilvray: Thank you, your Honor.

(The document referred to was marked for identification as Defendant's Exhibit A.)

Q. (By Mr. McGilvray): I show you Defendant's Exhibit A for identification, which is the yellow sheet, and which I have just asked you to indicate Page 1 with your initials and today's date and Page 2, today's date; now, referring to Page 1, it is my understanding it is your testimony that Page 1 was written after you made the notes on Page 2: is that correct?

(Testimony of Roy R. Anderson.)

A. Well, I wouldn't know for sure; I may have made some, might have made the notes on the back of a page that I had used before for notes.

Q. Now, I would like to refresh your memory——

Mr. Woodward: If your Honor please, I think the witness should be given the document and let him read it.

Mr. McGilvray: Well, I am going to do that, counsel.

The Court: Yes, he may have the opportunity to see it.

Q. (By Mr. McGilvray): I call your attention to Page 1 [39] and call to your attention certain dates thereon, and ask you if you want now to correct your testimony as to which was written first?

A. Well, yes, these were notes on what I—apparently what I did when I first got the case some time before I actually went down there, and then I flipped it over and wrote what—the notes when I talked to him.

Q. So you actually then wrote Page 1 first and Page 2 second: is that right? A. Yes, sir.

Q. Now, you told me earlier, and I think you told Mr. Woodward, that you received this case in April, is that right—no, about two or three weeks prior to April 14, 1953?

A. That is when I recall starting to work on it. I mean I am only guessing. We have so many files that it is hard to tell whether it was two weeks or two months.

(Testimony of Roy R. Anderson.)

Q. How many months have you known that this case was in this court and pending, sir?

A. Well, I think at first it was in June of this year.

Q. Well, you know, don't you, Mr. Anderson, that counsel for the defendant and the government have been ready to go to trial on this case at least ten times and because of crowded calendars we weren't able to? A. Yes.

Q. And you have reviewed the file today, certainly, [40] and on the many occasions we were going to trial?

A. Well, I looked at them, yes.

Q. Did you look at this memorandum that you made?

A. No, I don't recall looking at that for some time.

Q. You didn't look at it in preparation for appearing here today? A. No, sir.

Q. You knew you were going to be a witness for the government, didn't you? A. Yes.

Q. And still you told the Court that you hadn't seen this file for three weeks prior to April 14, 1953, didn't you? A. I hadn't then.

Q. But you didn't have the file, you didn't know anything about it, you said?

A. I was making an estimate of how long I had had it and what I recall as when I started to work on this case.

Now, it is possible that I had the file for some time before I started to work on it and it is hard

(Testimony of Roy R. Anderson.)

to remember now just when we do start to work on a case. We have more than one file to work on. We are working on many cases at the same time.

Q. I am going to ask you, sir, is this in your handwriting? A. Yes. [41]

Q. Is that in your handwriting? A. Yes.

Q. Both sides? A. Yes.

Q. I am going to ask you, sir, to read it to the Court. the whole thing, both sides and the dates.

A. This was the date, October 13, '52, I called at Centro-Market at 115 South Center Street, Stockton, was informed that the manager, Sam Wahyou, was out of town. Left message for him to call on Mr. Heckert the next time he is in San Francisco.

Then I have that Sam Wahyou lives at 1225 South San Joaquin Street, Stockton.

Q. Continue reading, sir.

A. The next note is December 5, '52. Looked for Hom Wing Sing at 750 Jackson. Learned from Hogan & Vest that he lives at Room 211, 855 Stockton. H & V had a notation "Collect rent from Hom Oak at 750 Jackson." One man at 750 Jackson said Hom Wing Sing is a seaman, now at sea.

Room 211, 855 Stockton, had a padlock on outside. The next note is dated January 6, '53.

Stopped at 855 Stockton. Padlock on Room 211. Left note in mailbox.

3-27-53. Widdifield is requesting State to check for U. S. passport under Sam Wahyou. [42]

(Testimony of Roy R. Anderson.)

State Department wants passport and full particulars on how it was obtained.

Q. That is all on Page 1? A. Yes, sir.

Q. So you received this file, certainly, on October 13th, and some time before, because you went there, didn't you?

A. Yes, sir, from that, I think.

Q. So you knew who Sam Wahyou was because you had gone there, hadn't you?

A. I hadn't seen him yet.

Q. No. But you asked him to see Mr. Heckert; is that right? A. Yes, sir.

Q. And Mr. Heckert, is he not the man in the Department who questioned Mr. Wahyou when he gave the statement? A. Yes, sir.

Q. He was the interviewer who gave the oath?

A. Yes, sir.

Q. By the way, did you have power to give an oath yourself? A. Yes, sir.

Q. You are authorized? A. Yes, sir.

Q. Do you know under what ruling or Federal statute?

A. Well, it is under the—one of the Immigration laws. [43] I don't recall offhand.

Q. Coming back to April 14th, you didn't administer any oath that date, did you?

A. No, sir.

Q. Now, can you tell me why you were looking for Hom Wing Sing, whose name is completely unfamiliar to me, in December of 1952?

(Testimony of Roy R. Anderson.)

Mr. Woodward: I will object to that as incompetent, immaterial.

The Court: The objection is sustained.

Q. (By Mr. McGilvray): Well, might I ask this, sir: Does the note that bears 12-5-52 and 1-6-53 have anything to do with the defendant in this matter?

A. It had some bearing on the investigation, is how it happens to be on the sheet, yes, sir.

Q. Now, these notes that you have on Page 2, sir, those are in essence the statements that he gave you, I presume, that day?

A. Yes, that is what he told me.

Q. He didn't tell you anything else than that, that is, other than your notes; is that correct?

A. After, when I asked him for enough information to be able to verify the birth record.

Q. You put down here that he told you he was born in Sacramento; is that correct? [44]

A. Yes.

Q. Well, previously in answer to Mr. Woodward's question—I am going to have to refer to my notes. Pardon me. You may want to look at that.

If your Honor please, would your Honor mind if I stand up there? Is that objectionable? Could I stand by the witness?

The Court: Yes, you may.

Mr. McGilvray: Because I am going to have to refer to his notes again.

Q. You told Mr. Woodward, sir, that Mr. Wah-you told you that day, "I am a citizen of the United

(Testimony of Roy R. Anderson.)

States, born in Sacramento, California." Was that your testimony? A. Yes, sir.

Q. Now, is there anything on these notes to the effect that he told you he was a citizen of the United States?

A. No, not on the notes here. This was as a result of getting information to check his birth record, I put that there.

Q. You told me that is the information he gave you and you put it down and it doesn't appear on the record, does it, that he told you he was a citizen?

A. Not on here, no.

Q. I am going to ask you this.

May this document be admitted into evidence, your Honor? [45]

The Court: Is there any objection?

Mr. Woodward: No.

The Court: It may be received as Exhibit A.

(The document referred to was marked Defendant's Exhibit A in evidence.)

Q. (By Mr. McGilvray): Are you quite sure that Mr. Loo went with you that morning into the office of Mr. Wahyou?

A. Yes, I am quite sure he did.

Q. Are you as sure in that respect as you are in all of the other testimony you have given us and then subsequently have had to correct it when shown your notes here, sir?

Mr. Woodward: I will object to that as being argumentative.

(Testimony of Roy R. Anderson.)

The Court: The objection is sustained.

Q. (By Mr. Gilvray): Is it not a fact that Mr. Ibo stayed downstairs and you went upstairs alone with Mr. Wahyou?

A. No, sir. He was in the room with us.

Q. Now, have you told us all of the conversation that you had with Mr. Wahyou that morning in his office?

A. So far as I can recall. There may have been other. I mean I can't remember verbatim what was said but I remember the most important.

Q. Let me refresh your recollection a little bit, and I will do it by asking you, for what reason did you come back to Stockton with a dictating machine and with Mr. Heckert and take a statement from Mr. Wahyou; was that by prearrangement [46] or just your own idea?

Mr. Woodward: I will object to that as being immaterial.

The Court: Overruled.

A. We do that in all cases of this type, we take a statement from them.

Q. (By Mr. McGilvray): Well, is it not a fact, sir, that Mr. Wahyou told you on April 14th in essence the following: That he was going to take a trip east and would be gone eight or nine weeks?

A. I don't recall that.

Q. Is it not a fact that he also told you that his attorney was out of town, was going to Europe and would not be back for about two or three months?

A. I don't recall that, no, sir.

(Testimony of Roy R. Anderson.)

Q. Is it not a fact that he told you that when he returned and his attorney returned that you could come up and take a statement and he would give it to you when his attorney was present and that he wanted it recorded and for you to bring the recording device?

A. No, sir; I don't believe that any statement to that effect was made at all.

Q. Is it not a fact that he told you that day after you told him who you were, that he said he didn't want to talk with you any more and that his attorney was away, his attorney had told him not to speak to any government agent [47] on any matter unless he was present, and for that reason and his attorney being away and going on a trip, that he would give you this statement upon his return?

A. No, there was no such conversation as that.

Q. You are quite sure of that, Mr. Anderson?

A. I am reasonably sure of that, yes, sir.

Q. When you came back in June, which was on June the 13th, if I am not mistaken——

A. That is right.

Q. ——Mr. Macomber came up immediately, did he not, and a statement was given?

A. Yes, he came immediately. After he found out we were there, he came immediately.

Q. And also is it not true that on June 10th this warrant that you speak of, which, incidentally, was a warrant of deportation, wasn't it?

A. No, warrant of arrest.

Q. For deportation?

(Testimony of Roy R. Anderson.)

A. I mean there is a distinction between warrant of deportation and a warrant of arrest.

Q. Well, it was a proceeding, was it not, for seeking deportation? A. Yes.

Q. Did Mr. Macomber talk with you that day in arranging for bond or discuss it with you or some agent the day that you were to arrest [48] him? A. Yes.

Q. Didn't you talk with Mr. Wahyou and Mr. Macomber and didn't you arrange for the 13th of June to come up and take the statement?

A. No. Oh, no.

Q. You didn't do that? A. No.

Q. All right. But you knew Mr. Macomber then?

A. I met him for the first time when he came to Mr. Wahyou's office.

Q. Didn't you discuss with him his European trip at all that day?

A. I don't recall it. We may have after the proceedings were finished; we may have, the four or five of us there may have talked about the trip, but I don't recall.

Q. Didn't he tell you of his experience in England with the former Mister Lord Chief Justice of England and having taken him up to Scotland and that sort of thing? Wasn't it a friendly sort of a talk?

A. I don't recall. You sort of bring back a hazy recollection of a little informal chat we had after the proceedings were finished, but I don't recall

(Testimony of Roy R. Anderson.)

any of the details of that conversation, because there were—they were not in—more of a frivolous nature.

Q. Well, now, subsequent to the date of April the [49] 14th and after you took the statement from Mr. Wahyou, you read that statement, I presume?

A. Yes.

Q. And you are familiar with it completely?

A. Yes.

Q. In that statement he gave a full and complete statement and disclosure of everything, did he not? A. Yes, sir.

Q. And there is nothing contained in this statement that is untrue; is that right?

A. Well——

Q. Withdraw the question. After taking the statement did you check the facts that he gave you therein?

A. Well, yes, they agreed with the information that was in our files. I checked that, one against the other.

Q. There is nothing untrue in the statement, is that correct?

A. So far as I know, it is correct.

Q. Now, you did nothing then with this statement or the information you had until the indictment was returned in this court this year, is that correct? A. That is right.

Q. Nothing at all? I am not speaking of you personally now; I am speaking of your department, sir.

(Testimony of Roy R. Anderson.)

Q. Well, I can't see any reason why they would do [50] anything with it except to use it in this court case.

Q. Well, as a matter of fact, did you not seek an indictment in the State of New Mexico against this defendant? A. Oh, sure.

Q. That is what I thought. Will you please tell us what the Department did on this case after you got the statement of June 13, 1953?

Mr. Woodward: To which I will object on the ground it is immaterial to the issues of this case.

The Court: What is the materiality of this, Mr. McGilvray?

Mr. McGilvray: Your Honor, it has always been a query in our minds as to the attitude of the Department in this matter of the long delay, and may be immaterial. But this witness recalls, apparently, only vaguely many things, but on the very vital issue, he is so prominent in it, and it is more or less inquiring—he says he has done nothing, and it is more or less a testing of his memory, very frankly, as to his credibility.

Mr. Woodward: If your Honor please, I think you are well enough aware of the wonders of the government and its departments to understand that an investigator doesn't know what is going on in the department and would have no way of knowing.

Mr. McGilvray: I am only asking him what he knows, [51] your Honor.

The Court: I will allow it only for the purpose

(Testimony of Roy R. Anderson.)

of testing his memory and credibility. Just state what you know.

Q. (By Mr. McGilvray): Do you recall the question?

A. We wrote up a report, myself and my superior, to submit it to the United States Attorney in New Mexico, but—because there was a violation within the jurisdiction of the court in New Mexico, to see whether or not he was interested in prosecuting for the violation which occurred down in New Mexico.

Q. They did not indict there, did they?

A. No, they didn't.

Q. Did you not also seek an indictment in San Francisco of Mr. Burke's office, United States Attorney, two years before this indictment?

A. That is the first—as I recall, that is the first place we submitted the case to. It was in the form of a letter to Mr. Burke who was over——

Q. And he refused to indict, is that correct, or refused to present it to the Grand Jury?

A. I don't know if he refused. It seems that he suggested that we submit it to the United States Attorney down in New Mexico because that appeared to be the more recent of the violations. [52]

Q. Now, regarding the warrant that you served, could you—you have said it was for seeking deportation. I seem to be confused on that. Would you tell us, please, exactly what type of warrant was served on June 10, 1953?

A. Well, the title of it is, "Warrant of Arrest,"

(Testimony of Roy R. Anderson.)

and, of course, it is an order to take persons into custody which we have reason to believe are illegally in the country, so that their cases may be heard to determine whether or not a warrant of deportation should be issued.

Mr. Woodward: May I interrupt you there? If your Honor please, I am going to move to strike the questions and answers given heretofore concerning what Mr. Burke's attitude was and what he did with reference to the presentation of a matter to him back in 1952. I think it calls for an opinion and conclusion and hearsay.

The Court: I will rely on my notes on that: "Sought indictment in San Francisco and no action." I am not concerned with Mr. Burke's feelings or the opinion of this witness at all. We don't have a jury here; that doesn't mean I want to leave the rules of evidence out the window.

Mr. Woodward: Very well.

The Court: So for the sake of the record, that will be stricken, Mr. Woodward.

Mr. Woodward: Thank you.

Q. (By Mr. McGilvray): In regard to the warrant, after [53] it is served, what does the Department do in the ordinary course of its affairs?

A. The officer who serves the warrant——

Q. No. I will reframe it. I don't want to go into that. After he is arrested, isn't there a hearing of some kind held? A. Yes, sir.

Q. Has there been a hearing held in that matter? A. No, sir; not in that case.

(Testimony of Roy R. Anderson.)

Q. Thank you. That is all I want. In other words, there has been no hearing on the matter since the arrest? A. No, sir.

Q. And it hasn't been assigned for hearing, in the Department for hearing?

A. I don't know whether it has been assigned. It may be on the calendar for a future hearing.

Q. But you don't know. It certainly hasn't been heard to date?

A. So far as I know it hasn't.

Q. Now, you are an investigator only and not an inspector, is that correct?

A. That is right.

Q. You have never been an inspector, is that correct? A. Oh, I have, yes.

Q. But not on this case? [54] A. No.

Q. When you went down to Stockton on April 13th of 1953, you were only an investigator and not an inspector? A. That is right.

Q. Now, when you asked him these questions on April 13, 1953, did you inform Mr. Wahyou of any rights that he might have before he made a statement, and particularly as to his right to have counsel and his right to be informed of the matters you were investigating?

A. At that point I had—no, we do that before we take a formal statement.

Q. But you didn't do it on April 13th?

A. No, sir.

The Court: Is that April 13th or 14th? The indictment says April 14th.

(Testimony of Roy R. Anderson.)

Q. (By Mr. McGilvray): Was it April 14th?

A. Yes.

Q. April 14, 1953? A. Yes.

Q. So you didn't tell him anything as to his rights? A. No, sir.

Q. How long did this conversation take place on April 14, 1954?

A. I should estimate about ten minutes or possibly fifteen minutes. [55]

Q. Well, when you went down there in April, you had no doubt in your own mind, had you, that Mr. Sam Wahyou was the person that you wanted to talk to?

A. Well, that is what I went there to find out, whether he was the one or not.

Q. Well, you had already investigated it, eight months before, you had made some notes on it. You had the file, didn't you, sir?

A. Before I went there?

Q. Why, yes.

A. Well, I was reasonably—I mean I had a good reason to go to San Francisco—to Stockton, I mean. I was that reasonably certain that I was dealing with the right person that I had been informed about.

Q. You knew who you were going to see and you knew why you were going there?

A. Yes. I was going there to see Sam Wahyou, of course.

Q. And you knew at that date that he was the person that you were investigating, didn't you?

(Testimony of Roy R. Anderson.)

A. He was the person I was investigating, yes, of course.

Q. Then when you told us this morning earlier that you didn't know for sure, that was not a true statement, was it?

A. Now, wait a minute. I said I didn't know for sure whether he was the subject of the Immigration file that I had [56] on a Chow Bing Kew.

Q. Well, you made some notes in your memorandum, our Exhibit A, in October of 1952, and you knew who he was because you had gone there, you had gone to Stockton to see him.

A. Yes. Oh, I had gone there; I still hadn't met him yet.

Q. You didn't have much doubt in your mind that he was the man you were investigating, did you?

A. I was reasonably sure he was, but that is what I was there to find out.

Q. Was it perhaps one of those possibilities that Dr. Kirk has been testifying about in Oakland, that it was about 125,000 to 1 that you were sure he was the one?

Mr. Woodward: Object to that on the ground it is argumentative.

The Court: Let's keep the Abbott case out of this.

Mr. McGilvray: All right.

Q. Now, you have been pretty vague in most of your testimony.

Mr. Cyr, could I see Exhibit A, please?

(Testimony of Roy R. Anderson.)

You have been pretty vague in a good deal of your testimony, and, of course, you know the count that I am examining you on is the count of—it is the count about your conversation. [57]

A. Yes, sir.

Q. In Stockton. And I call to your attention again Page 2, and you put down there that he told you he was born in Sacramento on 7-7-14. Now, is there anything in any of your writings besides this exhibit, or any notes that you made, that he told you he was a citizen of the United States?

A. No, sir.

Q. Now, as a matter of fact, all he told you that morning was that he had been born in Sacramento; isn't that true? A. No, sir.

Q. All right. Can you tell me, then, why you didn't put on your notes that he told you he was a citizen of the United States?

A. Yes, sir, I can tell you.

Q. Why didn't you put it down then?

A. I wrote down the information that I needed to check the birth record.

Q. Why didn't you put down that he told you he was born in the United States?

A. I just didn't see the need for it.

Q. You just didn't see any need for it, is that right? A. No, sir.

Q. Well, may I ask you this: When you went down there you were under instructions to go from your Department head, were you not? [58]

A. Yes, sir.

(Testimony of Roy R. Anderson.)

Q. Were you asked to inquire of him as to his citizenship that morning?

Mr. Woodward: If the Court please, I will object to that as being immaterial.

The Court: The objection is overruled.

A. We normally ask that question. I mean we have been instructed to ask that question, whether they are a citizen of the United States, and I usually always do, as a matter of fact.

Q. Isn't that rather the basis of the second count that the government has filed, that is, the fact that he told you he was a citizen of the United States?

The Court: Mr. McGilvray, I am not concerned with what he thinks about the indictment. I am only concerned with the facts.

Mr. McGilvray: All right.

Q. I hate to come back to this, but you are still quite certain that he told you he was born in the United States or was a citizen of the United States?

A. Yes, sir.

Mr. Woodward: If the Court please, I think I will have to object to that as being ambiguous.

The Court: It has been answered.

Mr. Woodward: Well, it could be very material, though, [59] if he said he was a citizen.

The Court: You may clear it up on redirect examination, if you wish to, Mr. Woodward.

Mr. Woodward: All right, sir. Thank you, your Honor.

Q. (By Mr. McGilvray): You are quite sure there was no conversation that you would come back

(Testimony of Roy R. Anderson.)

later and take his statement that morning of April 14, 1953?

A. No, there was—I didn't make any arrangements for that.

Q. Well, did he tell you that he wanted his lawyer present when he gave you a statement?

A. No, there was no mention of a lawyer that first day.

Q. But you didn't take his statement?

A. I didn't record a statement, no, sir.

Q. Well, you didn't take one from him, did you, and have him sign it? A. No, sir.

Mr. McGilvray: That is our cross-examination, your Honor.

The Court: Very well.

Mr. Woodward: May we proceed, your Honor?

The Court: Yes.

Redirect Examination

By Mr. Woodward:

Q. Mr. Anderson, on April 14, 1953, did you ask Mr. Wahyou, the defendant here, if he was a citizen of the [60] United States?

A. Yes, sir. I told him that we had received information to the effect that he was not a citizen of the United States, and he said, "I am a citizen of the United States. I was born in Sacramento."

Mr. Woodward: No further questions.

Mr. McGilvray: That is all.

Mr. Woodward: Thank you, Mr. Anderson.

(Testimony of Roy R. Anderson.)

The Court: Just one moment, please, Mr. Anderson. I just want to check something here. You said that after you had talked with the defendant on April 14th that you made an examination for a birth certificate and you found that.

A. Yes.

The Court: That is Exhibit 2. Can you tell us when you got the information contained in the birth certificate? What I am trying to get at is was it between April 14th and June 10th?

A. Oh, yes.

The Court: It was?

A. It was during that period of time.

The Court: And is that true also of the death certificate?

A. Death certificate, the same date.

Mr. Macomber: What day was that? [61]

The Court: He didn't state the date. It was between April 14th and June 10th of 1953?

A. Yes, sir.

The Court: Can you give us the approximate date?

A. It must have been within a week, I would say, after April 14th, that I got it.

The Court: That is the only question.

Mr. McGilvray: Could I have one more question on that?

The Court: Yes, based on the Court's question.

(Testimony of Roy R. Anderson.)

Recross-Examination

By Mr. McGilvray:

Q. Did you have the certificates that you obtained from the Department of Public Health of the State of California the day you went there; did you get copies that day?

A. Photostatic copies, yes, sir.

Q. Where are those, sir?

A. They are in the Immigration file.

Q. Will you produce them for me?

(Documents produced.)

Mr. McGilvray: Might I ask, your Honor, does counsel have the date that these were received? There is nothing on here to show the date this was issued.

The Court: Is there anything in your record?

Mr. Woodward: I would assume, your Honor, that document—the back of one of them indicates that it was [62] received by the Naturalization Office here May 15, 1953.

Mr. McGilvray: That doesn't show the date it was issued, sir.

Mr. Woodward: No, it doesn't.

The Court: No. I would like to know that date, and perhaps Mr. Cameron could supply that information if counsel will contact him, and perhaps we can stipulate to the date when Mr. Cameron or the Department gave the photostatic copies to the Immigration Service.

(Testimony of Roy R. Anderson.)

Mr. Woodward: I would be happy to, your Honor.

Mr. McGilvray: Their record would show that through a receipt.

The Court: Did you have to pay for those?

A. No, sir.

The Court: If you paid for them, I am certain there would be a date.

Mr. Woodward: We would be happy to check that, your Honor.

Mr. McGilvray: We would be happy to work with Mr. Woodward on that.

The Court: Any further questions of this witness?

Mr. McGilvray: No, your Honor.

Mr. Woodward: May I ask one more, your Honor?

The Court: Yes. [63]

Redirect Examination

By Mr. Woodward:

Q. Was it because of what you had found when you went to the Bureau of Vital Statistics and found a birth certificate and death certificate of Donald H. Wahyou that you returned to Stockton and took the written statement? A. Yes, sir.

Mr. McGilvray: May I just ask one more question in reference to that?

The Court: Very well.

(Testimony of Roy R. Anderson.)

Recross-Examination

By Mr. McGilvray:

Q. There was no other reason that you went back to Stockton in June other than the fact that you got the birth certificate?

A. Went back there to take—or with the warrant of arrest to place him under arrest.

Q. I know. But three days later you came back and took his statement? A. Three days?

Q. Yes, three days after you arrested him under your warrant you came back and took a statement?

A. No. We took the statement the same day.

Q. You are quite sure of that?

A. As we served the warrant, yes, sir. [64]

Mr. McGilvray: I am sorry. I misunderstood you on that.

The Court: I would like to clear up my notes on that. I have a date here, June the 10th and June the 13th.

A. June 10th was the date the warrant was issued.

Mr. McGilvray: But you didn't serve it until the 13th?

A. That is right.

Mr. McGilvray: And that is the date you took the statement?

A. Yes, sir.

The Court: Very well. That clears it up. You may step down.

Mr. McGilvray: Your Honor, we have a man from Stockton on one or two facts who is flying to New York. He is in the baking business. He has to fly out this afternoon. We would like to put him on out of order, reserving the right to make my motions upon the government resting their case. Mr. Woodward said he would be willing to do that.

The Court: Very well.

JOHN INGLIS

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Your name, please?

A. John Inglis, I-n-g-l-i-s.

The Court: Take the witness. [65]

Direct Examination

By Mr. Macomber:

Q. What is your business or occupation?

A. I am manager of a bakery, wholesale bakery.

Q. The Sunbeam Bakery?

A. Sunbeam Bakery, Stockton, California.

Q. Do you know Sam Wahyou, this gentleman here? A. Yes, I do.

Q. How long have you known him?

A. Twenty, twenty-two years.

Q. And you have lived in Stockton all that time?

A. I have lived in Stockton all my life.

Q. And you know he lived in Stockton all that time? A. Yes, I do.

(Testimony of John Inglis.)

Q. Did you have occasion to meet his father?

A. Yes, I did.

Q. When was that?

A. It was in the spring of 1938.

Q. Relate to the Court the circumstances under which you met him.

A. Well, they were rather unusual circumstances that we met.

Mr. McGilvray: Will you speak louder, please?

A. I say they were rather unusual circumstances that I met Sam's father. Our company delivers bread to the [66] Daylite Market in Brentwood. The store manager of Brentwood phoned the bakery and said that our salesman was robbing the store, in that our salesman delivered bread about 5:00, 6:00 o'clock in the morning, before the store was opened. He entered the store, would leave his bread and then charge for the bread that he had left. This was first turned into our sales manager. Something like that was serious enough that I thought I better handle it myself.

I made arrangements with Sam Wahyou to enter his store before our salesman did and check the merchandise in the store, observe him as he brought the merchandise in, and then check what was happening afterwards.

I met Sam Wahyou about 4:00 o'clock in the morning, about an hour before our salesman got there in the store. I went upstairs over the sales portion of the store and looked down in—there is a hole in the wall or floor, and I could see what our

(Testimony of John Inglis.)

salesman would do. That was about 4:00 o'clock. Sam let me in then. I was left in the store looking down there. An elderly Chinese man was up there, or came up later, and he said, "What are you doing here?" And I told him what I was doing. I asked him who he was. He told me he was Sam's father. And then at that time our salesman came in there, left this merchandise and left. And then Sam came back and Sam introduced me to this gentleman as his father. [67]

Q. (By Mr. Macomber): What was his name, the old gentleman's name, do you remember?

A. I don't remember his name.

Q. Wahyou?

A. It was Wahyou, yes, but what his first name was I don't know.

Q. Now, do you know the reputation——

Mr. Woodward: Now, if the Court please, if I may interrupt at that point, could I ask that the testimony given so far be stricken as being a self-serving hearsay?

Mr. Macomber: Well, it is the defendant's state of mind, which is very material to this inquiry, your Honor.

The Court: I will reserve ruling on the motion.

Q. (By Mr. Macomber): Mr. Inglis, do you know the reputation of Sam Wahyou in Stockton for truth, honesty and integrity?

A. I would say Sam's reputation in Stockton is the best. I know of no instance where Sam has said

(Testimony of John Inglis.)

something or acted in any way but an honorable manner.

Mr. Macomber: That is all.

Cross-Examination

By Mr. Woodward:

Q. Mr. Inglis, how long has your company been doing business with Mr. Wahyou?

A. I would have to go back to the record. I [68] would say it was about 1930 when he first opened up there.

Q. And is he a large customer of the Sunbeam Bakery? A. Yes, he is.

Mr. Woodward: No further questions.

Mr. Macomber: That is all. May this witness be excused, your Honor?

The Court: Yes. How much longer will your case take, do you estimate, Mr. Woodward?

Mr. Woodward: If your Honor please, if I can put on one more witness, which will take, I would say, three minutes, I will rest. And the reason I would like to put him on is Mr. Knesek will have to be before Judge Halbert this afternoon on another case.

The Court: Very well. You may call him.

Mr. Woodward: Thank you.

L. D. KNESEK

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Your name, please.

A. L. D. Knesek, K-n-e-s-e-k.

Direct Examination

By Mr. Woodward:

Q. Mr. Knesek, where do you live?

A. Sacramento, California. [69]

Q. What is your local residence?

A. 2318 St. Francis Drive.

Q. What is your occupation?

A. Investigator with the Immigration and Naturalization Service.

Q. How long have you been connected with the department? A. Twenty-nine years.

Q. Are you presently engaged in that capacity?

A. Yes.

Q. I will show you a certified copy of the birth certificate of Donald—I should say a photostatic copy of birth certificate of Donald Harold Wahyou and death certificate of Donald Harold Wahyou, which a few moments ago was produced from the Immigration file at the request of Mr. McGilvray; is that correct? A. Yes.

Q. Those are the copies you produced?

A. That is right, sir;

Q. Do you of your own knowledge know when those copies were obtained by the department and placed in the file?

(Testimony of L. D. Knesek.)

A. I cannot say upon what date the copy of the certificate of death of Donald H. Wahyou was obtained and placed in the file, but the certificate of birth of Donald Harold Wahyou was obtained by this office on May 15, 1953.

Q. And it was then placed in the file at that time? [70] A. Yes.

Q. Is that indicated by any marking on the birth certificate?

A. Do you mean on the original?

Q. No, on the photostatic copy.

A. Oh, yes, it is indicated here by the rubber stamp impression here, United States Department of Justice, Immigration and Naturalization Service, Sacramento, California, May 15, 1953, certifying true copy, and that is signed by Mr. Furmer, an investigator of this office.

Q. So that would be the date that your department placed it in the file? A. Yes.

Mr. Woodward: May 15, 1953. May the certified copy of birth certificate be introduced as government's Exhibit next in order?

The Court: Is that a duplicate of Exhibit 2?

Mr. Woodward: Well, it is similar. It was made at the same time. I don't know. We will check that portion of it with the Bureau of Vital Statistics.

Mr. McGilvray: We have no objection to it. Do you want to put the other one in, too?

The Court: I see no necessity for cluttering up the record with two photostatic copies of the birth certificate if the only purpose of it is to show that

(Testimony of L. D. Knesek.)

it was received [71] by the Immigration and Naturalization Service on May 15, 1953.

Mr. Woodward: That is the only purpose, and we have that in the record so there is no necessity of putting it in.

The Court: Yes. The record so shows. But I would still like to know when the photostatic copies were issued by the Bureau of Vital Statistics before the government rests.

Mr. Woodward: We will endeavor to get that information. No further questions.

Cross-Examination

By Mr. McGilvray:

Q. You, yourself, didn't obtain these, Mr. Knesek? A. No, sir.

Q. So you don't know when they came from the State Department, then, or the California Department?

A. All I can say is that when we obtain those documents, usually Mr. Cameron will have those documents photostated, he calls us and tells us that he has them ready.

Q. But you don't know of your own knowledge when they were ordered or who got them first?

A. No.

Q. You don't know how they got into your file or who sent them? A. No, sir.

Mr. McGilvray: Thank you.

(Testimony of L. D. Knesek.)

The Court: But that is the official stamp of [72] your office that appears on that?

A. It is.

The Court: Very well. You may step down. Do you have any idea, Mr. McGilvray, how long your case will take?

Mr. McGilvray: We possibly could finish this afternoon if we could work all afternoon from 1:30 to 4:00 or from 2:00 to 4:30.

The Court: I will compromise and we will start at 1:45 and maybe we can finish up. Court will recess until 1:45 this afternoon.

(Whereupon, a recess was taken in this matter until 1:45 o'clock p.m. of this same [73] day.

December 14, 1955—1:45 P.M.

The Court: Were you able to get that information?

Mr. Woodward: If the Court please, during the noon recess we were informed and Mr. McGilvray was informed that the information is not available. They didn't keep any records, since there was no charge, and if there were any records, I believe they were destroyed.

Mr. McGilvray: He said they would have destroyed them by that time. They don't keep them. But there are none, he said.

Mr. Woodward: So apparently we have nothing further to offer on that.

The Court: Very well.

Mr. Woodward: Therefore, at this time we rest.

Mr. Macomber: At this time on behalf of the defendant I move for a judgment of acquittal on these grounds: The first count lies under Section 18, U.S.C.A., 911, to wit, that the defendant on January 18, 1952, did knowingly and unlawfully falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.

The evidence in support of that count is the application for an off-sale beer and wine license—off-sale. The law [74] of the State of California on that is perfectly clear. Only an on-sale license requires citizenship. An off-sale license does not require citizenship. That form is made for both types of licenses. Insofar as an off-sale license is concerned, that question: "Are you a citizen of the United States," is wholly immaterial. Under 18 U.S.C.A., 911, it is incumbent upon the government to prove a fraudulent purpose. The cases I cited in my memorandum——

The Court: Yes. I read your very able memorandum rather hurriedly before I came on the bench this morning.

Mr. Macomber: Then I am not going to belabor the matter.

The Court: Yes. I suggest that you state your grounds for the motion for judgment of acquittal.

Mr. Macomber: That the evidence produced in support of the first count of the indictment is in-

sufficient to sustain a conviction, that it does not state any cause of action against this defendant.

The Court: Will you state your grounds as to Count 2?

Mr. Macomber: Now, as to Count 2, the defendant is charged under 18 U.S.C.A., paragraph 1001, with making a fraudulent statement—not a claim of citizenship, but any fraudulent statement—to one Anderson, an investigator of the Immigration Service.

First of all, I suggest that under U. S. vs. [75] Doshen, 133 Fed. 2d 757, and 8 U.S.C.A., paragraph 1357(b), Mr. Anderson, being an investigator only, had no power to administer oaths. Secondly, under the cases I have cited, U. S. vs. Stark, and I am not going to read all of them, that he could not have made a decision in this matter, he was in no position to do it, and all these other grounds that are set out by the United States District Court, much more ably set out than I could repeat them to your Honor. I submit that the evidence is insufficient to sustain any conviction of this defendant, and that the evidence offered here does not state any cause of action against this defendant.

The Court: I would like to make a more thorough study of the cases that were set forth in your trial brief, and, also, I would like to give Mr. Woodward an opportunity to file a memorandum.

Mr. Macomber: I appreciate that.

The Court (Continuing): On the law of the case. So I will reserve ruling on the motion for judgment

of acquittal on each count and ask you to proceed with the defense.

Mr. Macomber: I will call Mr. Carlos W. Helton.

CARLOS W. HELTON

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Your name, sir? [76]

A. Carlos W. Helton.

Direct Examination

By Mr. Macomber:

Q. Where do you live, Mr. Helton?

A. I live at 1044 West Vine Street in Stockton.

Q. What is your business or occupation?

A. I am supervisor of stores for the Daylite Market and Centro-Mart.

Q. How long have you been so employed?

A. Since 1944.

Q. What are your duties in that connection?

A. Well, general supervision of all the stores and, oh, general routine work under Mr. Wahyou, personnel and, oh, documents and so forth.

Q. Is it one of your duties to obtain licenses for the various stores? A. Yes, it is.

Q. How many stores are there and what are they, what do they consist of?

A. Well, there are six stores. We have two stores in the City of Stockton, we have one small store in the City of San Jose, we have a store in Brentwood, Oakley and Tracy.

(Testimony of Carlos W. Helton.)

Q. What kind of stores?

A. Large supermarkets, grocery stores and meat and [77] so forth.

Q. I show you Exhibit No. 1 and I will ask you, have you ever seen that document before?

A. Yes, I have.

Q. Will you tell the Court under what circumstances that document was prepared and all about it?

A. Well, we had a small store in the City of Oakley that was destroyed by fire on Thanksgiving Day.

Q. What year? A. Sir?

Q. What year?

A. I believe it was 1952, if I remember correctly. And that was on Thanksgiving Day. And then we were wiped out completely. And then about a year and a half later we made—we built our new store. No, it wasn't. It was 1951 we had the fire. It was about a year and a half later we built the new store, and at that time we needed to renew our alcoholic beverages control license for our new store. And the office for that area is in Martinez, so I went to Martinez to find out whether or not we should renew our old license or make an application for a new license, since we hadn't been in business for that length of time. And the young lady in the office told me that it was just as easy to make an application for a new license rather than to try to renew the old one. [78]

(Testimony of Carlos W. Helton.)

Mr. Woodward: If the Court please, I don't see any point in all this hearsay.

The Court: I am not concerned with it, either. Just tell what you did, not what was said at that time.

A. Well, I went to the Board at Martinez to make an application for a new alcoholic beverage license, and at that time the lady in the office typed up the form for me and told me I had to get the officer to sign the application. And at that same time she gave me a self-addressed envelope so I could mail it to Sacramento. She said if I mailed it to her she would have to mail it to Sacramento and for me to mail it to Sacramento. So she filled the form out. I took it back to Stockton and Mr. Wahyou signed it and took it to Mr. Macomber's office and had the signature notarized. And this is the copy, but it wasn't in this condition when I turned it in.

Q. (By Mr. Macomber): What condition was it in when you mailed it?

A. Well, it didn't have all these deletions and scratched out places on it. I would never send an application out in that condition.

Q. Now there appears to be a number of scratch-outs. Were any of those scratch-outs on it when you mailed it in? A. No, sir.

Q. Was that for an off-sale beer and wine [79] license?

A. Off-sale beer and wine license, yes, sir.

Q. Did Mr. Wahyou read that document when

(Testimony of Carlos W. Helton.)

he signed it? A. No, he did not.

Q. You have handled many of those documents, have you not? A. Yes, I have.

Q. You give him many documents from my office to sign? A. That is right.

Q. Did you take it up to my office to be acknowledged? A. Yes, I did, sir.

Q. That is, to have it notarized? A. Yes.

Q. And my secretary was the notary?

A. Yes.

Q. And you mailed it in?

A. That is right, sir.

Q. With none of those deletions on there?

A. No, they weren't. I wouldn't send a thing like that in.

Q. This was for the Daylite Market in Oakley?

A. Oakley.

Q. And what kind of a business entity is the Daylite Market in Oakley?

A. Well, it is a large grocery store, meat market.

Q. Is it a corporation or firm or what? [80]

A. It is a corporation now.

Q. What was it at that time?

A. A partnership.

Q. How many partners were there?

Mr. Woodward: I don't see any materiality to this.

Mr. Macomber: It is material to this extent, your Honor, that this is obviously an application

(Testimony of Carlos W. Helton.)

for a partnership and not an application on behalf of this defendant.

The Court: I will allow the question.

Q. (By Mr. Macomber): How many partners were there in that partnership at that time?

A. Oh, about 14 or 15, I believe.

Q. And the application was made on behalf of the partnership, was it?

Mr. Woodward: I will object to that as calling for a conclusion.

The Court: The document speaks for itself.

Q. (By Mr. Macomber): Yes. But the application did state "Daylite Market" on it at that time?

A. Yes, sir.

Mr. Macomber: That is all.

Cross-Examination

By Mr. Woodward:

Q. Mr. Helton, you have stated that Mr. Wah- you did not read that application? [81]

A. No, he didn't, sir.

Q. Did you stand there and watch him sign it?

A. I did.

Q. And you are sure he didn't read it?

A. That is right. I am sure of that, sir.

Mr. Woodward: No further questions.

Mr. Macomber: That is all. The defendant will call Mr. Herbert Harper.

HERBERT H. HARPER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Your name, sir?

A. Herbert H. Harper.

Direct Examination

By Mr. Macomber:

Q. Mr. Harper, what is your address?

A. 342 West Nora Street, Stockton.

Q. What is your business or occupation?

A. I am vice president of the Stockton Savings & Loan Bank.

Q. How long have you been connected with the Stockton Savings & Loan Bank?

A. Since July 15, 1934.

Q. How long have you lived in Stockton? [82]

A. Oh, near Stockton—in Stockton and near Stockton about 48 years.

Q. Do you know Sam Wahyou, the defendant in this action? A. I do.

Q. How long have you known him?

A. Since 1941.

Q. And have you had occasion in the course of your business to discuss Mr. Wahyou's character and his reputation for truth?

A. Many times.

Q. Has your bank made him extensive loans?

A. Yes, we have; starting in 1941, he borrowed or a small house.

(Testimony of Herbert H. Harper.)

Mr. Woodward: If the Court please, I will object to that as being irrelevant.

The Court: I am not concerned with the details.

Mr. Macomber: All right.

Q. Now, do you have an opinion as to his reputation in Stockton for truth, honesty and integrity?

A. I do.

Q. What is it? A. Excellent.

Mr. Macomber: That is all. [83]

Cross-Examination

By Mr. Woodward:

Q. Mr. Harper, would you consider Mr. Wahyou a good customer of the bank?

A. We consider him a valued customer, yes, sir.

Mr. Woodward: No further questions.

Mr. Macomber: That is all. I had a couple of other character witnesses. They were going to be here at 2:00 o'clock, your Honor. They may be in the other courtroom. May I step outside just a moment?

The Court: Yes, you may.

Mr. Macomber: May Mr. Harper be excused, your Honor?

The Court: Yes.

Mr. Macomber: Call Mr. Murray.

W. H. MURRAY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Your name, sir?

A. W. H. Murray.

Direct Examination

By Mr. Macomber:

Q. Where do you live, Mr. Murray?

A. Stockton, California.

Q. What is your address? [84]

A. 6125 Cresenda Avenue.

Q. What is your business or occupation?

A. I am credit manager and assistant secretary of Garvey Truck Service.

Q. Were you formerly connected with the Stockton Savings & Loan Bank?

A. Yes, sir, as assistant secretary and chief teller.

Q. How long have you lived in Stockton and vicinity?

A. I have lived there approximately 20 years.

Q. Do you know Sam Wahyou, the gentleman on my right? A. Yes, sir, I do.

Q. How long have you known him?

A. I would say since about 1939 or 1940.

Q. Have you ever heard his reputation for truth discussed in Stockton?

A. Yes, I have. It has always been of the best. There has been nothing at any time that I have known him that has been said against him.

(Testimony of W. H. Murray.)

Q. Do you have an opinion as to his reputation in Stockton for truth, honesty and integrity?

A. Yes, I do.

Q. What is that? A. Excellent.

Mr. Macomber: That is all.

Mr. Woodward: Mr. Murray, I have a couple of questions. [85]

Cross-Examination

By Mr. Woodward:

Q. When you were with the Stockton Savings & Loan Bank, did you do business with Mr. Wahyou? A. Yes, I did.

Q. And in your present capacity as credit manager of Garvey Truck Service are you still doing business with him? A. No, sir.

Mr. Woodward: No further questions.

Redirect Examination

By Mr. Macomber:

Q. You haven't done business with him for some years? A. No, sir, I haven't.

Mr. Macomber: That is all.

The Court: You are excused, Mr. Murray.

Mr. Macomber: Mr. De Carli.

DEAN DE CARLI

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Your name, sir?

A. Dean De Carli.

Direct Examination

By Mr. Macomber:

Q. Where do you live, Mr. De Carli? [86]

A. 3414 Dwight Way.

Q. Stockton? A. Stockton.

Q. How long have you been a resident of Stockton or vicinity? A. For 25 years.

Q. What is your business or occupation?

A. In the milk production and distribution business.

Q. Were you a former mayor of the City of Stockton? A. Until recently.

Q. How recently? A. About a month ago.

Q. Do you know Mr. Sam Wahyou, the defendant in this case? A. Yes, I do.

Q. How long have you known him?

A. I have known him about ten years.

Q. How long have you know him by reputation?

A. About the same length of time, I would say.

Q. And have you ever heard his reputation or his character for truth discussed in the City of Stockton? A. Yes.

Mr. Woodward: I don't think that is a proper question, your Honor.

The Court: Well, the questions vary on that, on

(Testimony of Dean De Carli.)

this [87] type of evidence. I had occasion to go into it a couple of years ago. There was an excellent article in the Iowa Law Journal, and the questions seemed to go along this line, after laying the foundation: "Do you know whether so-and-so has a reputation for" whatever elements are involved "in Stockton?" That can be answered Yes or No. Then: "What is that reputation?" That appeared from this article to be the preferred type of question, although, as I say, they vary.

Mr. Macomber: May I rephrase the question?

Q. Do you know whether Mr. Sam Wahyou has a reputation for truth, honesty and integrity in the City of Stockton? A. He has, yes.

Q. And what is that reputation?

A. As near as I know, people that I have talked to, that reputation is A Number 1.

Mr. Macomber: That is all.

Mr. Woodward: In view of the answer, your Honor, I move that his testimony be stricken.

The Court: On what ground?

Mr. Woodward: On the ground he said that people he had talked to said it is good.

Mr. Macomber: That is the only way of determining reputation.

The Court: It is talking with somebody or lack of hearing [88] that forms the basis for the reputation, as a general rule. If you wish to examine him as to whether he only talked with one or two people, that may bring it down to the point where it can be stricken.

(Testimony of Dean De Carli.)

Cross-Examination

By Mr. Woodward:

Q. Mr. De Carli, you have stated that you were mayor until recently. Were you defeated for election?

A. No. The mayor serves in Stockton for one year, and I completed my one year term. I am still on the City Council.

Mr. Woodward: I have no further questions.

Mr. Macomber: That is all. Mr. Rimington.

ED H. RIMINGTON

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Your name, sir?

A. Ed H. Rimington.

Direct Examination

By Mr. Macomber:

Q. Where do you live, Mr. Rimington?

A. 1630 North Hunter, Stockton.

Q. How long have you lived in Stockton?

A. Fifty-eight years, all my life. [89]

Q. What business are you in?

A. I am in the general insurance business.

Q. Were you formerly a supervisor of the County of San Joaquin?

A. Yes, for 24 years, up until the first of the year when I retired.

(Testimony of Ed H. Rimington.)

Q. Do you know the defendant, Sam Wahyou?

A. Very well.

Q. How long have you known him?

A. Oh, I would judge some ten years.

Q. Do you know whether he has a reputation in the City of Stockton for truth?

A. Well, during this time I have never heard anything derogatory to Sam Wahyou's character for truth or anything else. Everybody who knows him have always spoken very well of him.

Mr. Macomber: That is all.

Cross-Examination

By Mr. Woodward:

Q. In your business have you had occasion to sell insurance to Mr. Wahyou?

A. Yes, I do some insurance business with him.

Mr. Woodward: No further questions.

Mr. Macomber: That is all.

The Court: You are excused, Mr. [90] Rimington.

Mr. Macomber: Mr. Wahyou, will you be sworn, please?

SAM WAHYOU

the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Clerk: Your name, please.

A. Sam Wahyou.

The Clerk: Also known as Chow Bing Kew?

A. Yes, sir.

The Clerk: Would you take the witness stand, please?

Direct Examination

By Mr. Macomber:

Q. Will you speak loud enough so that I can hear you. Mr. Wahyou? A. Yes, sir.

Q. Your name is Sam Wahyou? A. Yes.

Q. Have you ever been known by any other name?

A. Donald Harold Wahyou, also Jue Bing Cue.

Q. Jue Bing Cue was the name you were born by? A. Yes, sir.

Q. And what is your business or occupation?

A. General merchant, grocery store, meat market, furniture store, drug store, department store, cattle business, rancher, and Northwestern Development Company, [91] uranium business, farmer.

Q. Now, you are president of several corporations that operate supermarkets around Stockton?

A. Yes, sir.

Q. [redacted]ockton——

A. Stockton, Oakley, Brentwood, Tracy, San Jose, and Portland, Oregon.

(Testimony of Sam Wahyou.)

Q. Where were you born, Mr. Wahyou?

A. I was born in China.

Q. In what year? A. 1912.

Q. And you came here to the United States for the first time in what year?

A. I left Hong Kong 1928. I was in the United States in 1929.

Q. You were detained, were you?

A. Yes, I was detained in Angel Island Immigration Office for several months.

Q. When you were released from Angel Island —by the way, did you come here as the son of a merchant? A. Yes, sir.

Q. What is your father's name, true father's name? A. Jew Sai Dick.

Q. Also known as Jon Chow Shun?

A. Yes, sir. [92]

Q. Was he in Stockton at the time you came here in 1929? A. Yes, sir.

Q. And he had lived here ever since?

A. Yes, sir.

Q. Now, after you were released from the Immigration Service in 1929, where did you go?

A. I got released from Angel Island here during May, 1929. I left in the afternoon, late afternoon, so I went to San Francisco; the same night I went to stockton.

Q. And you lived in Stockton for some time?

A. Yes, sir.

Q. About how long?

(Testimony of Sam Wahyou.)

A. I lived in Stockton, oh, I say, a year and a half, a little better.

Q. What did you do in Stockton at that time?

A. First I come to Stockton at night. The next day I go work for my father. My father in the restaurant business.

Q. Did you also go to school?

A. I go to school a couple days later.

Q. How long did you go to school?

A. I go to school end of May, vacation coming, so I out of school. September school start again, I go back to school, Franklin School, Stockton, special class.

Q. And you went to school until when?

A. To December, Christmas vacation. I was off school [93] then.

Q. Have you gone to school since that time?

A. No, sir.

Mr. Woodward: If your Honor please, I think all this is immaterial.

Mr. Macomber: I think it is important to show his background, and I expect to develop the fact that at the time he made this—from the year 1934, until just a week or so before this statement was taken from him, that he sincerely believed himself to be an American citizen, and the only way I can show that is to show everything that is connected with it, what information he had to that effect and so on.

The Court: I am interested in his background. I

(Testimony of Sam Wahyou.)

don't want you to go into too much detail, but I want to know what kind of man is on trial.

Mr. Macomber: I am trying to shorten this as much as I can, and still give the Court a clear picture.

Q. Now, you have never gone to school since that time? A. No, sir.

Q. You worked in a butcher shop in Stockton for about a year and a half? A. Yes.

Q. And then what did you do?

A. I left Stockton in 1930. 1929 I went to Stockton, stay there until about a year and a half, December, '30, I [94] left Stockton for Portland, Oregon.

Q. What did you do in Portland?

A. I started the wholesale meat business in Portland, Oregon.

Q. With some partners?

A. With partners, yes, sir.

Q. You are still in business there?

A. Yes.

Q. And you came back to Stockton, did you, later on? A. Once a year.

Q. Well, did you move back to Stockton?

A. I moved back to Stockton, yes.

Q. What year? A. '36.

Q. Now, when you first came to Stockton did you become acquainted with a man named Jung Wahyou? A. Yes, sir.

Q. Also known as Charlie Wahyou?

A. Yes, sir.

(Testimony of Sam Wahyou.)

Q. Did he live in Stockton?

A. Yes, sir. I meet him in Brentwood, California.

Q. But he moved to Stockton?

A. He moved to Stockton.

Q. Where did he live?

A. He lived in Hunter Street. [95]

Q. With whom?

A. With his daughter, son-in-law.

Q. With his son-in-law? A. Yes.

Q. And daughters? A. Daughter, yes.

Q. How many daughters did he have?

A. Three daughters.

Q. Did he have a son? A. Yes, sir.

Q. All right. Now, did you become pretty well acquainted with him?

A. He was first person I met when I landed in the United States at Stockton, at Brentwood: I liked him. I liked him very much, yes.

Q. So you got pretty close with him?

A. Yes.

Q. Was there anything different about that man and most Chinese? A. Yes.

Q. What?

A. He is 100 per cent Americanized, not like an ordinary Chinese.

Q. Did he speak English exclusively?

A. Yes, sir. Family all talk English, they don't speak Chinese. [96]

Q. Now, did you have any occasion to ask him if you could become a citizen of the United States?

(Testimony of Sam Wahyou.)

A. Yes, sir.

Q. What did you say to him?

A. I talked to him.

Mr. Woodward: If your Honor please, again, I think that is all self-serving hearsay. I object to it on that ground.

Mr. Macomber: There is lots of authority to show that even though it is hearsay, it is not intended to prove the facts stated.

The Court: It is the idea of trying to show state of mind; is that correct?

Mr. Macomber: State of mind.

The Court: I will allow it for that purpose.

Q. (By Mr. Macomber): What did he say to you about that?

A. I talked to him different times. I say, "I come from China; can I be a citizen of the United States just like you people, just like Charlie Wahyou and family?"

I asked several times.

He said, "No, you can't be a citizen, you come from China, you are an alien."

We talk about it later. He says, "Well, maybe I talk to the lawyer see get in the law to get you to be a citizen."

So 1930, December. So I left Stockton to Portland, Oregon, but every year I come back and we still talk about. [97] And during 1934—I was with them people every year, and 1934 he wrote me. Before that he told me, he said, "I talk to lawyer. You

(Testimony of Sam Wahyou.)

can be a citizen, but the expense is going to cost about $500."

And I say that is fine. I say, "Don't cost me more than $500." So I say, "Charlie, I want a good citizenship paper. I am an alien from China. I want to be a good citizenship paper, I can live like the rest of the people, and I don't want no—the paper is not legal. I want good paper to show I am a citizen."

Q. That you were legally in this country?

A. Yes, sir.

Q. What did you finally get or hear from him about that citizenship?

A. Yes, sir. 1934 he wrote to me and then he says, "Your paper is ready. You can be a citizen. So you come down here." And so I did, I come down.

Q. And what happened?

A. I come down, I talked to him, I say, "That is a citizen paper, you got it?"

He says, "Yes, the lawyer got him."

I say, "Let's go to Immigration Office to get a proof to be I am a citizen."

So I did so, I went with Charlie Wahyou and lawyer come to Sacramento.

Q. What was that lawyer's name?

A. Law T. Freitas.

Q. Law T. F-r-e-i-t-a-s?

A. Yes, I guess so. I don't know exactly the spelling.

Q. Did you go to Sacramento?

(Testimony of Sam Wahyou.)

A. Yes, sir.

Q. Where did you go in Sacramento?

A. I come to Sacramento to the Immigration Office.

Q. Did you have a hearing at the Immigration Office? A. Yes, sir.

Q. What was the purpose of that hearing?

A. I didn't know. I was—asked him for United States to recognize I am a citizen, I would have to prove from the Immigration to recognize I am a citizen, then I be a citizenship. So I apply for the passport from Immigration Office.

Q. To see if the Immigration Service would recognize the paper? A. Recognize, yes.

Q. Do you know what kind of papers that the lawyer got for you? A. Yes.

Q. Or did you have any contact with this lawyer prior to the time you came down to Stockton in 1934? A. Yes. [99]

Q. How many times did you see Mr. Freitas?

A. I see at that time I came to Sacramento with Charlie Wahyou and Freitas. That was first time.

Q. Do you know when that was, the first time, approximately?

A. It was 1934 and late spring.

Q. Now, did you ask Mr. Freitas what kind of citizenship papers they were? A. Yes, sir.

Q. What did he say?

A. I asked him through Charlie Wahyou, because at that time I can't speak very good English, and part Chinese and part English.

(Testimony of Sam Wahyou.)

Mr. Woodward: If your Honor please, again I renew my objection that it is hearsay and self-serving.

Mr. Macomber: We have to show what led him to the frame of mind he was in. That is the purpose.

The Court: It is being allowed for that purpose and for that purpose alone. The objection is overruled.

Q. (By Mr. Macomber): What did he say?

A. I asked Charlie Wahyou and Law T. Freitas in the car when we come to Sacramento, I asked right to Freitas, I said, "Look, I come from China, I am an alien, I am a merchant's son. That is my father. I want you get me the adoption paper for me to be a citizen. I want a legal paper. I [100] don't want any papers that is not right, because I got right to stay in the United States if I am a good boy, but you have got to get me the citizen paper and must be legal."

Q. What did he say?

A. He say, "Yes."

Q. Now, were you ever in the Superior Court in Sacramento? Do you know what I mean by "Superior Court"? Not the Immigration court, but a courtroom like this? A. No, sir.

Q. Who did you go to the Immigration Service with; who accompanied you?

A. I have Charlie Wahyou and Law T. Freitas and myself, and also the grandma from Jackson, Mrs. Few.

(Testimony of Sam Wahyou.)

Q. Who was she?

A. Charlie Wahyou's wife's mother.

Q. And now, after this proceeding that you had, after you got these papers, what relationship did you sustain with, or what was your relationship towards Charlie Wahyou and his daughters?

A. Well, after this paper I get, and I asked Charlie Wahyou many times, and also Law T. Freitas, "Now, Charlie Wahyou adopted me to be his son, I support him, also their family, we live—our relationship just like a family." Law T. Freitas told me, he say I am his son. I say, "Charlie, how can I be his son? I am born in China. Now you tell me [101] you—I am born in China, you tell me I am a citizen of the United States born in the United States."

He says, "Look, you born from China. I handle the law. The law allowed you to do that. You just do what I tell you. You tell them you adoption, the paper for Charlie Wahyou's son. The law is legal for you his son."

I says, "Are you sure about it?"

I said, "Let's go to Immigration. Let's see they get me a citizenship paper."

Q. Did you ever hear from the Immigration Service? A. I applied for.

Q. Did you ever hear from them?

A. No, sir.

Q. Did you consult any other lawyer about those papers? A. Yes, sir.

(Testimony of Sam Wahyou.)

Q. Who did you talk to?

A. I talked to Mr. William Pluhaty.

Q. Where was he? A. Portland, Oregon.

Q. How long have you known him?

A. I know him for—since 1931.

Q. Was he your lawyer?

A. He is my company lawyer.

Q. How long has he been your company lawyer?

A. He was my company lawyer until 1944, 1945, until [102] he died.

Q. Did you consult him about the papers?

A. Yes, sir.

Q. What did you say to him and what did he say to you?

A. I asked him, I say, "Bill, I want to be a citizen, I want to be—get citizenship paper. This man tell me I go get the citizenship, he adopted me for son. Is that legal?"

So here is what he told me: He said, "As far as Oregon is concerned, yes; I don't know about California. I think that is about the same. That is legal." That is what he told me.

Q. Now, at that time you got a new birth certificate? A. At the time I talked to him?

Q. No. Did you have any papers at the time you talked to Mr. Pluhaty? A. No, sir.

Q. Did you get the papers later?

A. Yes; I got the papers later.

Q. All right. After you got those, was that paper that you got a new birth certificate?

A. Yes, sir.

(Testimony of Sam Wahyou.)

Q. Did you change your name at that time?

A. From 1934 up to Law T. Freitas give me that paper with the green cover in that stack of papers in there, he took those papers, went in the Immigration Office, applied [103] for passport, and I asked him a question, I say, "Now, this paper say I am born here. I born in China. This is not true."

He says, "That is true." He said, "You say that when you go to Immigration."

I say, "Look, I come in from Frisco, from San Francisco, the Immigration Office. This paper go in the same office, isn't it?"

I say, "We got to tell these papers truth about my birth."

He said, "Look, you are under adoption. You say, you just use this birthday you got today, this paper, you follow this." He said, "Forget the past."

Q. So from that time until the present day have you used this name of Donald Harold Wahyou?

A. Yes. Also Sam Wahyou.

Q. And what have you done with respect to claiming citizenship since 1934, since you got the paper? A. What is that, sir.

Q. What have you told people about your citizenship since you got that paper?

A. I have been, told people I am citizen all the time until 1953, until that time I talked with you and you told me papers are not right. I said, "Nobody know my name was Chow Bing Kow; all

(Testimony of Sam Wahyou.)

peoples know me as Donald Harold Wahyou or Sam Wahyou. That is my name."

Mr. Macomber: At this time, if the Court [104] please, I will offer in evidence the certified copy of the record in Sacramento under which—it was a petition—it was not an adoption proceeding—it was a petition to establish birth. Just one moment. I offer in evidence the Superior Court file of the County of Sacramento, California, action number 50615, in the matter of the petition to establish fact of birth of Harold Jung Wah You, also known as Donald Harold Wah You, together with the minute order showing that Law Freitas and Chung Wah You appeared in connection with that matter.

Mr. Woodward: I object to it on the ground it is incompetent, irrelevant and immaterial.

The Court: The objection is overruled. The record will be received as Exhibit B.

(The instrument referred to was marked Defendant's Exhibit B in evidence.)

Q. (By Mr. Macomber): Mr. Wahyou, after you got these papers did you register with Selective Service? A. Yes, sir.

Q. Did you tell the Selective Service Board that you were a citizen of the United States?

A. Yes, sir.

A. Did you claim any right not to go into the armed services because you were an alien?

A. No, sir. [105]

Mr. Macomber: I offer in evidence registration

(Testimony of Sam Wahyou.)

certificate of Sam Wahyou before Local Board No.——

Q. Do you remember the local board? It is kind of—— A. No. 37.

Mr. Macomber: Showing he registered on—for the Selective Service on October 16, 1940.

Mr. Woodward: I will object to it on the same grounds, your Honor.

The Court: Well, your objection is that it is incompetent, irrelevant and immaterial. Is that the sole basis of your objection?

Mr. Woodward: Yes.

The Court: The objection is overruled.

Mr. Macomber: Also offer in evidence notice of classification 3-A on February 25, '41.

Mr. Woodward: That has even less relevancy.

The Court: That will be received as Exhibit D.

(The instruments referred to were marked Defendant's Exhibits C and D in evidence.)

Q. (By Mr. Macomber): Mr. Wahyou, are you married? A. Yes, sir.

Q. When and where were you married?

A. 1938, June. I married at Reno.

Q. You are still married?

A. Yes, sir. [106]

Q. Living with your wife? A. The same.

Q. Do you have any children?

A. Yes, I have got one girl and one boy.

Q. What is your daughter's name?

(Testimony of Sam Wahyou.)

A. My daughter's name is Susie Jean Wahyou.

Q. Where was she born?

A. She was born in Stockton 16 years ago.

Q. And you have a son?

A. I have a son 4 years old, born February 14th, four years old.

Q. He was born in Stockton?

A. Stockton.

Q. Now, after you got these papers did you live with Charlie Wahyou when you came to Stockton?

A. Not only after I got the paper, even before that when I came to Stockton, always live with him.

Q. What happened to Charlie Jung Wahyou?

A. He died in 1941.

Q. Who paid his burial expenses?

A. I paid them.

Q. And Mr. Pluhaty, what happened to him?

A. He died 1944.

Q. What from?

A. Cancer. He is a young man, but he die in 1944. [107]

Q. Do you know what happened to Law T. Freitas?

A. I heard he is dead some time ago, but I don't know when.

Q. Now, with respect to this liquor license or off-sale beer and wine license application, is that your signature on that photostatic copy?

A. Yes, that is my signature.

Q. Do you remember reading that document be-

(Testimony of Sam Wahyou.)

fore you signed it? A. No, sir.

Q. Did you read it before you signed it?

A. Sometimes, just depends what kind of paper.

Q. Did you read this paper? A. No, sir.

Q. Do you sign many documents without reading them?

A. Just depends on where they come from. If they come from—anything in connection with law, why, I send to you. If you send them, I sign them.

Q. How many documents a week do you sign as a rule? A. Two, three hundred or better.

Q. Mostly checks in payment of invoices?

A. Oh, yes, invoice, paper, letter.

Q. Now, did you instruct Mr. Carlos Helton to see that you got the necessary licenses for the new store?

A. Yes, sir. He always—he is—it is his job to [108] take care of all the licenses, and report back, tell me what it is all about, how they operate. It is his job to do that.

Q. Did you sign it before Miss Snyder?

A. I always sign the paper in my office and then Mr. Helton take it up.

Q. Now, do you remember an occasion in the early part of 1953, when Mr. Anderson came to see you? A. Yes, sir.

Q. Do you know Mr. Anderson, investigator for the Immigration Service? A. Yes, sir.

Q. Do you remember the first time you met him? A. I met him first time 1953.

(Testimony of Sam Wahyou.)

Q. All right. Tell the Court the circumstances under which you met him, who was present and all about it?

A. I had the note from my girl, secretary, give it to me. The note say this—I didn't keep the note. The secretary give me the note. She said the Immigration Service from San Francisco come to see me during 1951—no—yes, 1951—no—say '52 say he will be back to see me. The first time I see him, I can't tell you exactly the date, but during April.

Q. April what year?

A. 1953. 1953. He come to see me in the morning. I saw him. He is walking around the store, the main floor. [109] So I was there pretty early so he didn't know me, I didn't know him. I asked him, "Sir, are you looking for something?"

He said he is looking for Sam Wahyou. I said, "That is me."

He said, "Like to talk to you."

I said, "Sure. Come up."

It was early, so I take him to my office, and he has another man with him, Chinese fellow. So he says, "You speak good English."

I said, "Yes, I don't need no interpreter."

So the Chinese fellow downstairs. Mr. Anderson and I went to my office. He asked me, he say, "What is your name?"

I said, "You know that, Sam Wahyou."

He say, "Where you born?"

I said, "I born in Sacramento." He says—then

(Testimony of Sam Wahyou.)

I told him, "What is all about it? What you want?"

He said, "I am from Immigration."

"Oh," I said, "You from Immigration. You have anything to show me you are from Immigration?"

Then he show me like a pocket book with a badge in it. Excuse me. He show me that. So I say, well, I say, "I can't talk to you this time about this matter. I am planning going away with the lawyer back east. Why can't we arrange another time when I come back? I either call you or you call me, about a couple of months, as soon as we come back, [110] and I give you the true statement. And also when you come, you bring the machine, record it down."

I said, "Don't bring the people here that write down. I don't like that. I would like to have my own words sticking into there."

So, I don't think we have been there very long, maybe five minutes, three minutes, I don't know, I don't know, I can't tell you exactly, but very short time.

He said, "That is fine, and I be back."

So then he left.

Q. All right. Now, at that time did you tell him that you were a citizen of the United States?

A. I don't think so, definitely I say, no. I told him I born in Sacramento. He asked me where I am born and I say I was born in Sacramento.

Q. Now, a few days after that did you go to New York with me? A. Yes, sir.

(Testimony of Sam Wahyou.)

Q. And I went to Europe and you stayed there in New York?

A. New York and Washington, D. C., and Chicago.

Q. All right. Now, a few days after I got back from Europe did you see Mr. Anderson again?

A. I see Mr. Anderson again during June.

Q. All right. Would it be about June 13th?

A. Well, at the—yes, to my thinking. I don't know [111] exactly the date because I didn't keep track of it. They say it is the 13th.

Q. What day of the week? A. Saturday.

Q. Saturday morning?

A. Not in the morning. Between noon—I don't know when—got through afternoon—about two thirty.

Q. All right. Now, at that time who came to see you?

A. Mr. Anderson and another fellow supposed to be his boss name George. I don't know what is the last name.

Q. George?

A. George, yes, and one more, another fellow, young fellow, three people.

Q. Does the name Heckert sound——

A. Something like that. He is the man called the boss down at Frisco about put up the bond.

Q. Now, at that time three came to your office?

A. Three came to my office.

Q. And they asked you if you would give them a statement?

(Testimony of Sam Wahyou.)

A. I met them downstairs. I take them to—up to the office and I said, "I can't give you a statement at this moment. I have got to get my lawyer in person because my orders have got to be done that way."

So I call up. So you come down right away. Then after you come down we sit in the room and I asked Mr. Anderson [112] and the rest of the people excuse for a minute. I want to talk to my lawyer for a minute to see before we get going. So I guess they just left in the office there, in the hallway, just about a second. We asked them to come back.

Q. Did you at that time give them a full, true and correct statement of every question they asked you? A. Yes, sir.

Q. To the best of your knowledge?

A. And they asked me a question, Mr. Anderson and also another gentleman asked me a question and I give them a true statement the best I can remember They asked me something maybe J forget because back too long.

Q. Now, getting back to Mr. Charlie Jung Wahyou, since you got these papers have you treated his daughters as your sisters? A. Yes, sir.

Q. They have talked to you about it, various matters?

A. My sisters, when they got married, they asked me, "See this fellow here, so and so, Jim so and so says I can marry him." I say, "Yes."

My second sister—first she marry a man, guy named Ted, but I tell him, say, "No, you don't want

(Testimony of Sam Wahyou.)

to marry this guy." But second one I tell them, "Yes." They discuss with me.

Q. All right. Did you pay Law Freitas any money at all?

A. No, sir; I didn't pay him. [113]

Q. Did you give Charlie Wahyou any money to give Law Freitas? A. Yes.

Q. How much?

A. Over two hundred dollars.

Q. In what amounts; all at one time?

A. All at one. That is for the lawyer fee, and I am against him. I didn't have the paper from Immigration.

Q. All right. Did you give him in addition to these lawyer fees, did you give Charlie Wahyou any money?

A. Oh, I give him money occasionally. He live, he never work for a long time, from time to time, just many years.

Q. Did he work for you at one time?

A. Yes, sir; he worked for me at one time at Brentwood store.

Q. How long did he work there?

A. He didn't work very long because he is old man. I say I take him down there. He asked me to help me out. He says, "I don't do nothing, spending your money, so maybe I can go down there and cook for you."

And I said, "Okay, I will take you down to Brentwood." So I take him down.

Q. Now, while he was at Brentwood did you in-

(Testimony of Sam Wahyou.)

troduce him to John Inglis? A. Yes, sir. [114]

Q. As your father? A. Yes, sir.

Q. That was the occasion that Mr. Inglis testified about this morning?

A. Well, Mr. Inglis, John Inglis, he already introduced to him already when I was get there. I introduce to John. He said, "He told me he is your father." By the way, I was up there pretty early in the morning.

Q. Now, this store at Oakley, the old store had burned down? A. Yes, sir.

Q. In what year, do you remember?

A. 1951, the morning, Thanksgiving Day.

Q. And you started to build a new store some time after that?

A. I built a store, started building in 1952, started to work in October, get it completed in 1951—let's see—'52 start building—'53, I think, on April 4th we opened.

Q. All right. Now at that time was that a partnership? A. Yes, sir.

Q. How many partners?

A. Oh, about sixteen or seventeen.

Q. And you were one of the partners?

A. Yes, sir.

Q. The managing partner? [115]

A. Yes, sir.

Q. And this off-sale beer and wine license was for the partnership? A. Yes, sir.

Mr. Macomber: I think that is about all we

(Testimony of Sam Wahyou.)

have. Could we have a few minutes recess so I can go over my notes?

The Court: We will take a recess.

(Recess.)

The Court: Had you completed your direct examination, Mr. Macomber?

Mr. Macomber: No, your Honor.

Q. Mr. Wahyou, from 1934, when you got these papers, up until '34—I mean until June of 1953, did you believe that you were the legally adopted son of Charlie Jung Wahyou?

A. From 1934 to 1953, until you and I discussed the paper, until you told me that paper was not right, I am not legal citizen, and before that all the time I thought I was a citizen.

Mr. Macomber: That is all.

Q. Well, did you believe that you were legally the adopted son of Charlie Wahyou?

A. Yes, sir.

Q. Then in 1953, about the first part of June when I came back from Europe——

A. Yes, sir. [116]

Q. ——is that the first time you discussed that matter with me? A. Yes, sir.

Q. And I looked at the papers at that time?

A. Yes, sir.

Q. And I told you you were not a citizen?

A. Yes, sir.

Q. That is the first time you knew?

(Testimony of Sam Wahyou.)

A. That is the first time I discussed with you about the paper.

Mr. Macomber: That is all. You may cross-examine.

Cross-Examination

By Mr. Woodward:

Q. Isn't it true that during this period of time from 1934 when you got the papers that your true father, your natural father, was living with you?

A. You mean father, original father, or the one that I——

Q. No, your natural father.

A. My natural father. Yes.

Q. During the course of your various discussions that you had with Charlie Wahyou did you ever discuss with him the fact that he had had a natural child by the name of Donald Harold Wahyou who had died years before?

A. No, sir. He didn't tell me that first. [117]

Q. He did tell you that at some time or other, though?

A. I—oh, during 19—oh, '39 or '40, those days, my sister told me they have a brother under that name. I didn't know that before.

Q. So then it was just mere coincidence that you used the name of Donald Harold Wahyou for your name?

A. Yes, sir. That is the name he gave me.

Q. Now, after this Court Order was obtained were you given the whole sheaf of papers, some-

(Testimony of Sam Wahyou.)

thing like that, with a blue wrapping, I believe you mentioned, by Mr. Freitas? A. Yes, sir.

Q. Did you read those documents?

A. No, sir; I can't read those days.

Q. Well, do you still have those documents?

A. I had it before and I lost by fire, and we sent for the copy from Sacramento.

Q. Did you read that at any time?

A. No, sir.

Q. You have never read any of those documents? A. No, sir.

Q. Now, did you ever register to vote as a citizen of the United States? A. What is that?

Q. Did you ever register to vote?

A. Yes, sir. [118]

Q. And have you ever had to produce a birth certificate to carry on any of your business or private activities?

A. No. What do you mean by that?

Q. Well, after you had this Court Order I believe you obtained a new birth certificate.

A. Yes.

Q. Did you get a copy af that new birth certificate? A. Yes, sir.

Q. Did you have occasion to use it?

A. Yes, sir.

Q. Have you read it? A. No, sir.

Q. You never did? You used it and you never read it? A. No.

Q. Now, I will show you photostatic copy of the birth certificate; have you ever seen a document

(Testimony of Sam Wahyou.)

like that? A. No, sir.

Q. You never have?

A. Never looked. I seen one.

Q. You stated that you got a new birth certificate, did you not? A. Not like this.

Q. Well, did you get one on a piece of white paper with black writing on it?

A. No, sir. [119]

Q. Never did? A. No, sir.

Q. You never got a copy of a birth certificate?

A. No, sir. I got that stack of papers with the green cover outside. That is the only one I have.

Q. Did you ever get what we would call a birth certificate which is similiar to what I showed you? It could be printed differently. It could be printed on white paper or it could be black, a photostatic copy like this. A. No, sir.

Q. Never did? A. No, sir.

Q. Now, you stated in answer to some of counsel's questions that the first time you realized you were not a citizen after you had gone through this procedure with Charlie Wahyou was when you talked to Mr. Macomber in 1953?

A. That is first time I realized that my papers were not right.

Q. I see. Now, there is no doubt in your mind, is there that when you applied for a passport that you were not born in this country; isn't that true?

A. That is true, I am not born in this country.

Q. When you talked to Mr. Anderson and told

(Testimony of Sam Wah You.)

him that you were born in Sacramento, you knew that was not true, didn't you? [120]

A. I know that isn't true, but before, the lawyer—I only discussed it with them before, I said, "It isn't true when you say you adopt me for son. I am born in China. How come you say I am born in Sacramento?"

He says, "Yes, that is the way you tell people, you born in Sacramento, you under adoption paper. That is, you have got to go by that way."

Q. But you knew you were not born in Sacramento? A. Yes, sir; I know that.

Q. Well, after 1953, when you had talked with Mr. Macomber and you had given a statement which is in evidence setting forth the fact that you were born in China and not in Sacramento, did you hold yourself out to anyone as having been born in Sacramento?

Mr. McGilvray: Was that after, counsel, June of 1953?

Mr. Woodward: Yes, after the statement was given and he had discussed the matter fully with Mr. Macomber.

Mr. McGilvray: I just want to be clear on the question.

Mr. Woodward: Yes.

A. When Mr. Macomber comes back from Europe it is the first time I discuss with him the paper.

Q. (By Mr. Woodward): Yes.

(Testimony of Sam Wahyou.)

A. He told me the paper is not right.

Q. I see. Well, so there won't be any question, the papers that you referred to were your various birth [121] certificates? A. Yes.

Q. And on June 13, 1953, you did give the statement that we have talked about here this morning?

A. Yes, sir.

Q. Which is Government's Exhibit 7?

A. Yes.

Q. Now, my question is: After you gave this statement and after you had talked with Mr. Macomber did you hold yourself out to anyone as having been born in the United States, born in Sacramento or in the United States?

A. I don't quite understand your question.

Q. Oh. Well, did you ever tell anybody after July of 1953 that you were born in Sacramento?

Mr. Macomber: Objected to, your Honor, as immaterial.

The Court: The objection is overruled.

A. Want me to answer that question?

The Court: Yes, answer the question.

A. After that day Macomber told me not to discuss anybody about that business unless he is present, and anything been come up here, he want to be there about this case. And I never tell anybody. I can't sign any papers unless he says yes.

Q. (By Mr. Woodward): But that is really not in answer to my question. May I rephrase the question again so we won't [122] have any doubt about it. Did you after July, 1953, tell anyone that

(Testimony of Sam Wahyou.)

you were born in Sacramento? A. No, sir.

Q. Are you sure of that?

A. Yes; I no tell anybody.

Q. Now, you understand what I mean?

A. After 1953, June, I don't tell anybody I am born in Sacramento?

Q. Right. And you did not?

A. No; I didn't.

Q. Do you recall in March of this year, 1955, making an application with the Penn Mutual Life Insurance Company for some life insurance?

A. Life insurance? This year?

Q. Yes, sir. A. What is the name?

Q. The Penn Mutual Life Insurance Company of Philadelphia.

A. I talked to some insurance company.

Q. Do you recall making an application for insurance?

A. No. The insurance company asked me to buy insurance. I told them this way, I told him, I said, "I couldn't buy insurance now. I don't know in my case what is going to be. If I tell you if I born in Sacramento and American citizen, I am wrong; If I tell you another way, then I am wrong. I don't know which way I am standing."? I said, "Only way I can [123] buy insurance policy until this case is over." So he asked me question. So I say I can't buy insurance now until my case is over. Whatever he do, I don't know, but he take all my insurance policies to read it. He told me I got to buy $150,000 insurance, or so and so, to be covered.

(Testimony of Sam Wahyou.)

And I don't know what he do. From there on I don't know. That is the way I told the man. I never see this man for some time.

Q. I would like to show you a piece of paper and I will ask you just one question.

Mr. McGilvray: Could I see it first?

Mr. Woodward: May I just get him to identify it?

Mr. McGilvray: Oh, yes.

Q. (By Mr. Woodward): I will ask you if you see your signature on that document?

A. Yes, sir; that is my signature.

(Document handed to counsel.)

Q. Calling your attention to this document which is a photostatic copy of Part 1, application for insurance, to the Penn Mutual Life Insurance Company, Philadelphia, Pennsylvania. You will notice on the top that the name of the proposed insured is Sam Wahyou, and then down here in 3, place of birth, Sacramento, California, 7-7-1914, age nearest birthday, 41. A. Yes, sir. [124]

Q. Do you recall seeing and reading that document and signing it?

A. I guess I do. My signature is there. As far as I remember, I don't even know—don't even remember who is this agent's name, the insurance company had been talking to, and I know I didn't bought this policy.

Q. But that is your signature?

(Testimony of Sam Wahyou.)

A. That is my signature all right.

Q. And you do see the statement on there that the birth of yourself, Sam Wahyou——

A. Yes, sir.

Q. ——is in Sacramento? A. Yes, sir.

Q. Do you recall making this application?

A. I didn't make it. The people make it up for me to sign it here, see, approved.

Q. And you talked to the agent and gave him the information which he put on the form and then you signed it, did you not?

A. No. I don't know these people. I don't know who sent it. If it is somebody, has got to know me very well to send this agent to talk to me. When the agent talked to me, then I probably gave him the rest of the policies and read it over and see.

Q. Now, do you recall reading these words which appear [125] immediately above your signature: "I represent that the statements and answers in this Part 1 are written as made by me, or by the proposed insured to whom the statements and answers relate if the applicant is other than the proposed insured and are full, complete and true and agree that they and the statements of the proposed insured in Part 2 shall be a part of the contract of insurance if issued and the Company, believing them to be true, shall rely and act upon them. I also understand and agree that:" Then it goes on and discusses about the premiums.

A. Well, as far as that, I didn't read this policy. I didn't read it.

(Testimony of Sam Wahyou.)

Q. But that is your signature?

A. The application there, they want to sell me $100,000 insurance, and I signed it approved.

Mr. Woodward: May I move the admission of the application heretofore identified as Government's next in order in evidence.

Mr. Macomber: I object to that as incompetent, irrelevant and immaterial.

The Court: The objection is overruled. The photostatic copy of the application will be received as Exhibit 9.

(The instrument referred to was marked Plaintiff's Exhibit No. 9 in evidence.)

Q. (By Mr. Woodward): Mr. Wahyou, do you recall going [126] to a Dr. W. Theodore Hill on March 17th of this year? A. March 17th?

Q. Yes, sir. A. 1955. About what?

Q. Did you go to a Dr. W. Theodore Hill?

A. Where? Where is the doctor? What town?

Q. Well, I don't know. Do you recall going to a doctor by the name of Hill?

A. I don't remember, sir. I go see doctor occasionally. I don't remember.

Q. Mr. Wahyou, I will show you photostatic copy of Part 2, statements to the medical examiner, Penn Mutual Life Insurance Company, Philadelphia, Pennsylvania. Full name of proposed insured, Sam Wahyou, examined 11:00 a.m. this 17th day of March, 1955, and signed down at the bottom by

(Testimony of Sam Wahyou.)

W. Theodore Hill, and another signature. Do you recognize your signature upon that document?

A. Yes, that is my signature.

Q. Does that refresh your recollection as to whether or not you were examined by Dr. Hill?

A. I don't remember the name. I remember now this doctor—two doctors; yes, I remember now.

Q. And you were examined by a doctor there in Stockton? A. Yes, sir.

Q. And did he ask you various questions? [127]

A. No, he didn't ask me questions.

Q. He didn't ask you any questions?

A. No, sir. He asked me about my health.

Q. Now, do you recall his asking you for some family history, about how old your father was?

A. This is the agent do that. He don't ask.

Q. I see. The agent——

A. Agent makes all these things up here and take them to the doctor.

Q. Now, did you tell the doctor when you last had a cold or consulted for treatment or anything like that? A. What is that?

Q. Did you tell the doctor when you had last been to another doctor?

A. No. I told the doctor—the doctor asked me how is my health condition. I tell him, "I am a sick man and you are a doctor. You ought to tell me my health condition."

Q. Do you remember telling the doctor that you had had a cold five or six months before March

(Testimony of Sam Wahyou.)

17th and that you had gone to Dr. Woo in San Francisco?

A. Yes, I told him. I think I told him that.

Q. Do you remember the doctor then writing various things as you answered his questions?

A. I don't think the doctor asked me any questions except my sickness, is all. And I always tell the doctors, [128] I want to find out myself about my health condition, and I want to tell him—anything wrong with me, I tell them immediately, so I say he can check out that way. But I don't think he asked me any questions about the form, I don't think.

Q. Did you tell the doctor that you were born in Sacramento July 7, 1914?

A. I don't think so.

Q. Do you remember reading these words which are right above your signature: "I represent that the statements and answers in Part 2 are written as made by me to the medical examiner are full, complete and true and agree that they shall be a part of the contract of insurance if issued," and then your signature, "Sam Wahyou"?

A. I didn't read it, sir. I signed application to buy insurance, but I didn't read it.

Mr. Woodward: Move that Part 2 of the application, Part 2 of the statements to the medical examiner be introduced as Government's next in order.

Mr. McGilvray: We would make the same objection that we did to Exhibit 9, your Honor.

(Testimony of Sam Wahyou.)

The Court: Very well. The same ruling. The photostatic copy of Part 2 of the application will be received as Exhibit 10.

(The document referred to was marked Plaintiff's Exhibit No. 10 in evidence.) [129]

Q. (By Mr. Woodward): Now, do you recall being examined by a Dr. John C. Lynch on the 17th of March, 1955?

A. The same date the other one?

Q. The same date, and apparently from Stockton.

A. Yes. I saw two doctors the day the agent took me in there, make the appointment, one of them on Charter Way and one of them on California Street.

Q. Do you recall talking to Dr. Lynch?

A. I talked to both doctors. I talk to people, yes.

Q. Do you recall telling the doctor or someone in his office that you were born in Sacramento July 7, 1914?

A. I don't think I talked to anyone in the office, sir. The agent take me into the doctor. I wait over there. I told him I got to be back my office certain length of time. They got all arranged. In fact, I told the doctor I was sick. The agent was back to the doctor's and said, "He just told you he is sick, he is not sick." I had a cold for some time. I don't remember talking to anyone. But I got an agent with me, talk me all the time.

Q. You told the doctor that you had had a cold in January, 1955; isn't that right?

(Testimony of Sam Wahyou.)

A. Yes, I probably did. I had a cold for some time, my sinus trouble.

Q. And you told him that you had been to Dr. Henry Woo, is that correct? [130]

A. Yes, sir.

Q. And had also been treated by Dr. H. F. Quinn, is that right? A. Yes, sir.

Q. Then I will show you this document, which is a similar statement to the medical examiner; is that your signature on the bottom of that?

A. Yes, sir, that is my signature.

Q. What date were you actually born?

A. My actual born March—well, March 3rd, I think. Also, I kind of forget the date, because I have been—use that, my adoption paper says July 7th, and I think my registration for alien last time. I think March 3rd, I think. I didn't go through and put in my head on that date, but I believe it is March 3rd.

Q. Of what year? A. 1912.

Q. So that then the statement on the document that I just showed you when you were talking to Dr. John C. Lynch that you were born in—place of birth, Sacramento; date of birth, July 7, 1914, was false?

A. I don't believe I told him, sir, because I never gave him any question on—during—when—the insurance company, they take my insurance policy, all my insurance policies, that way, and he just fill up and take it over there [131] for see the doctor check my health.

(Testimony of Sam Wahyou.)

Q. So he filled it in and took it over?

A. I don't think so he filled in that day.

Q. At any rate, was this document filled in when it was handed to you to be signed?

A. Yes, sir.

Q. Did you read the words on it that: "I represent that the statements and answers in this Part 2 are written as made by me to the medical examiner, are full, complete and true and agree that they shall be a part of the contract of insurance if issued."?

A. I didn't read it, but I signed my signature to it and I told that agent I couldn't buy insurance until——

Q. Mr. Wahyou, roughly, what do you feel the value of your various businesses are?

A. How is that?

Q. Roughly, what do you feel the value of your various businesses are?

Mr. Macomber: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. I can't answer that. I can't understand that.

Q. (By Mr. Woodward): I say, roughly, what do you feel you are worth in dollars and cents?

A. I worth a half of a million dollars, [132] myself.

Q. As such a responsible business man, is it your custom to go around signing things without reading them?

A. I believe that I signed this with one condi-

(Testimony of Sam Wahyou.)

tion, and—I can't remember this man. He was either sent by Tom Barry from Elk Grove, that is one insurance company sent me that, another man sent by Macomber, insurance man sent to see me. I relied on these people. If they sent it to me, I have got to talk to them, and all I know is just the application for $100,000 insurance, and I didn't bought that, and I didn't bought it. I told them I can't buy no insurance unless my case is over, I don't know where I am at.

Mr. Woodward: If your Honor please, I move that answer be stricken as not responsive.

The Court: It will be stricken.

Q. (By Mr. Woodward): To repeat my question, Mr. Wahyou, is it your custom as a responsible business man to sign documents and papers without reading them?

A. I feel this way: It just depend on the paper, who sent it.

Mr. Woodward: If the Court please, I will move into evidence the statements to medical examiner made to John C. Lynch on the 17th of March, 1955.

Mr. Macomber: The same objection, your Honor.

The Court: The same ruling. The photostatic copy will be received as Exhibit No. 11. [133]

(The document referred to was marked Plaintiff's Exhibit No. 11 in evidence.)

Mr. Woodward: No further questions, your Honor.

(Testimony of Sam Wahyou.)

Mr. McGilvray: Just a few on recross, your Honor.

Redirect Examination

By Mr. McGilvray:

Q. Mr. Wahyou, there has been introduced in evidence Exhibits 9, 10 and 11 for the Government, and those applications are with the Penn Mutual Life Insurance Company, Exhibit 9 being the application for insurance for $50,000—correction and strike that—apparently the sum indicated is $100,000. Now, in that, also, you indicated that you have some other insurance with some other companies, and you use the Franklin Life for $90,000, and the date of issue was 1949 to '53; now, do you still have that insurance policy?

A. Franklin Life Insurance?

Q. Yes. A. Yes, sir.

Q. Now, you told Mr. Woodward that you had given the agent—and I can't make the man's name out, unfortunately, looks like—well, it is undecipherable, your Honor. Do you know the man's name who came to see you?

A. I remember now, I think, the man sent by Macomber.

Q. You don't recall his name? [134]

A. I don't remember his name, heavy set fellow, weight about 220 pounds, about 5 feet 11 inches.

Q. At that time you had this policy with Franklin Life and you had other policies, didn't you?

A. Yes, sir.

(Testimony of Sam Wahyou.)

Q. Did you have one with Metropolitan Life Insurance Company and an endowment policy on your life for $1,500 that you purchased in March, 1936? A. Yes, sir.

Q. That policy I have last referred to, is it still in full force and effect?

A. One more year and it will be paid.

Q. A twenty-year endowment?

A. Yes, sir.

Q. And you are still making payments, then, on the Franklin Life Insurance policy?

A. Well, I have got several insurance.

Q. Then you have told Mr. Woodward, I think, that you had given him your policies; is that right?

A. Yes, sir.

Q. All of them to look over? A. Yes.

Q. Did you give them to him before you signed this or after you signed this, the application, Exhibit No. 9?

A. To my thinking, he just give me the form for me to [135] sign it. He tell me—he said, "It is just an application." He told me that, "This is just the application," and I signed it. I think I signed it, and then he took—fill it up, because I gave him the place to work with, because I was talking to people.

Q. Did you give him some policies of life insurance on your life? A. Yes.

Q. Did you do that at the same time, then, as you signed or before?

A. No. I got the insurance policies about this thick (indicating), with a book, everything together.

(Testimony of Sam Wahyou.)

Q. In the office? A. I gave him that.

Q. He was in your office?

A. The next office, I think.

Q. What is that?

A. The next office to me.

Q. The next office to you. He went in there and worked, did he? A. Yes.

Q. Was he there alone?

A. I was busy with someone, and then he came in later.

Q. Did he work on these papers while you were busy, do you know? [136] A. Yes.

Q. Now, as I recall, you told Mr. Woodward you don't remember telling him you were born in Sacramento or you don't remember him asking you many questions?

A. Definitely, I not talking to him that way, because he just checking how much insurance I got and how much I need, how much more I need.

Q. Now, among those papers in your insurance papers, which you have kept, have you noticed there is always a photostatic copy of your paper for application that accompanies your policy?

A. Yes, sir.

Q. And were those photostatic copies that you have, were those on all of your policies as far as you know that day?

A. I don't know, but I check those policies. Most of them have it.

Q. All right. I am going to show you, now, if

(Testimony of Sam Wahyou.)

you—could this be marked for identification as exhibit next in order, sir?

The Court: Exhibit E for identification.

(The document referred to was marked Defendant's Exhibit E for identification.)

Q. (By Mr. McGilvray): I am going to show you a policy of the Metropolitan Life Insurance which has been marked Exhibit E for identification, and it is policy of endowment [137] for $1,500 or 20 pay life, and attached thereto is your application to this insurance company which bears the date of—at Portland, the 15th day of March, 1936, and it has the signature on the bottom of it—and I am going to ask you if that is your signature on the right-hand corner of the bottom page of this black photostat? A. Yes, sir.

Q. Did you make that application?

A. No, sir, I didn't make that application.

Q. Well, did you sign it? A. I signed it.

Q. In Portland, Oregon, did you ask for some insurance and get it?

A. I still remember the fellow's name. John Henry, he wrote up the insurance.

Q. But you gave him the information, or to someone, and he filled it in; is that correct?

A. Yes, that is correct.

Q. Upon that, did you give your birth place as being Sacramento, California, July 7, 1914?

A. Yes. I always give from 1934 up to—when I

(Testimony of Sam Wahyou.)

got the adoption paper, I have been use the same birth, the same name all the way through.

Q. And you gave him your age as being twenty-two years old, or it was dated 22; is that [138] right?

A. That I don't know. My adoption papers show 1914.

Q. So you used that date in 1936 when you bought this policy? A. Yes, sir. Yes, sir.

Mr. McGilvray: I forgot to ask that this be introduced in evidence as our next exhibit.

Mr. Woodward: I will object to it as incompetent, irrelevant and immaterial.

Mr. McGilvray: The reason I am asking it be introduced is it shows that that agent was working from previous insurance papers and dates which coincide exactly, and it is for that reason, for application to this last bit of evidence that has gone in as part of the government's case that we are offering it.

The Court: It will be received for a limited purpose, and that is if it is tied in with the exhibits offered by the government. I am not sure that it has been.

(The document referred to was marked Defendant's Exhibit E in evidence.)

Q. (By Mr. McGilvray): Now, that exhibit that has just been introduced, was that one of the policies that you allowed your agent—rather, the agent for the Penn Mutual to see that day?

(Testimony of Sam Wahyou.)

A. Yes, sir. I remember who is the agent, too.

Q. What is his name? [139]

A. I can't remember the name, but sent by Macomber.

Q. You told us that.

A. I thought it was another one, but it was Forrest Macomber. That is the reason I have him look——

Q. Let's not volunteer anything, just answer the questions, please. Was this one of the policies that you showed the agent that day, or let him use or look at? A. Yes.

Q. It was in with your other papers?

A. All the insurance policies.

Q. They were all there together?

A. All together.

Mr. McGilvray: That is all.

Mr. Woodward: No further questions.

Mr. McGilvray: Could we have one moment?

The Court: Yes.

Mr. McGilvray: May I proceed, your Honor?

The Court: Yes.

Q. (By Mr. McGilvray): You told Mr. Woodward, I believe, that you had told the agent because of the circumstances that you didn't know what birthday to use; was that your testimony?

A. Yes, sir.

Q. Could you just tell us again, to make it clear to me, what you told the agent in that regard?

A. I told the agent, I said, "I need some [140] insurance, but I can't buy it because I don't know

(Testimony of Sam Wahyou.)

what I am going to use, which birthday I am going to use. You have got to wait for this case over, then we discuss about it." He called me up two or three times, sent me a wire, letter, many times.

Q. At that time you were out on bond on the warrant of deportation or whatever it was; is that correct? A. Yes, sir.

Q. Which is still pending against you?

A. Yes, sir.

Mr. McGilcray: That is all.

The Court: Any further questions?

Mr. Woodward: No questions, your Honor.

The Court: I would like to ask one question. The partnership at the time you filed the application for the off-sale beer and wine license, was that a registered partnership registered under the laws of California?

A. Yes, we register them. We register in Stockton name of the partners.

The Court: With all of the names of the partners?

A. Yes, sir.

The Court: And doing business under what name?

A. Under the Daylite Market.

The Court: How many partners were there?

A. I believe it is sixteen or seventeen.

The Court: Were they citizens of the United States?

A. That I don't know, sir. That is—I didn't ask [141] them. I know some of them are citizens.

(Testimony of Sam Wahyou.)

The Court: Some were citizens?

A. Yes.

The Court: And some were aliens?

A. Some I don't know, but I know a few of them, that is, one born here, I know are citizens.

The Court: Well, who was the principal partner? Were you the principal partner?

A. I am present principal, yes, sir.

The Court: At that time?

A. Since I started.

The Court: Well, let's go back to this date in January of 1952.

A. Yes, sir.

The Court: You were the principal partner at that time?

A. Yes, sir.

The Court: Are there any questions based on my questions?

Redirect Examination

By Mr. Macomber:

Q. Mr. Wahyou, the partnership had a sales tax permit issued to it by the State Board of Equalization? A. You say I had one?

Q. Yes, the partnership did, a sales tax permit?

A. Yes, sir.

Q. And the State Board of Equalization knew who all [142] the partners were?

A. They know all from the beginning, they got all the names.

Mr. Macomber: That is all.

The Court: You may step down.

Mr. McGilvray: We rest our case, your Honor.

Mr. Woodward: Might I recall Mr. Anderson for a short rebuttal, your Honor?

The Court: Yes.

ROY J. ANDERSON

recalled as a witness in rebuttal, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Woodward:

Q. Mr. Anderson, you heard the defendant, Mr. Wahyou, testify earlier this afternoon as to having made an application to the Immigration and Naturalization Service for a passport; is that correct?

A. Yes, sir.

Q. Now, is there any record in the official files of Mr. Wahyou making an application of some sort or another at approximately the time he mentioned?

A. Yes, sir, we have a complete file on that [143] application.

Q. And what type of application was it?

A. It was an application for what would probably be known to him as a passport, but to us it is a document which is issued to citizens of the United States for trips to China so that they can go and be readmitted to the United States as citizens of the United States.

Q. And is that commonly known as a re-entry permit?

(Testimony of Roy R. Anderson.)

A. Well, we call it a form 430, which is the form number. It is a form of re-entry permit, or, also, a form of a passport, whichever you want to call it.

Q. Now, does the file indicate whether or not that application was granted?

A. The file indicates that it was denied.

Q. Does the file indicate the reason for the denial?

A. The basis for the denial was that he had—he hadn't satisfactorily established that he was a citizen of the United States born in Sacramento, as he was claiming at that time.

Mr. Woodward: No further questions.

Mr. McGilvray: No questions, your Honor.

Mr. Woodward: Thank you, Mr. Anderson. We rest, your Honor.

The Court: You may step down.

As I indicated before, Mr. Woodward, I would like to have the benefit of any authorities you can find in connection with the problems raised by the defendant in the trial brief [144] that was filed with me this morning, and I think it might be helpful.

I am not going to make any findings of fact at the present time. But you can go along the same lines as Mr. Macomber did on Count 1, that even if the representation was made, as testified to by Mr. Anderson, whether the proof would be sufficient to find the defendant guilty on Count 1—I mean Count 2. As I said, I read your trial brief hurriedly this morning. And this case involves a rep-

resentation made to an investigator of the Immigration and Naturalization Service, which might be different from representations made to a member of the Federal Bureau of Investigation because their functions are different. And, of course, the testimony in this case will be different from the case that you cite in the brief.

How long will it take you, Mr. Woodward, to prepare a memorandum?

Mr. Woodward: Well, I had no intention of going into it as exhaustively as counsel. As you say, they did a very thorough piece of work, going into the history of the thing. I don't think it will be necessary for me to go into that portion of it. I will try to get it in within the next day or two.

The Court: Well, I don't want to rush it, because it takes some time to research a question like this. And you [145] would, perhaps, want an opportunity to reply.

Mr. Macomber: I know that there are additional authorities.

The Court: Well, I would like to have the benefit of counsel's research on this, on the problems involved in this case, and I want to give you ample time. I am looking at the calendar because I will leave Sacramento on December 20th and return on January 9th, and I would rather have you spend your time helping me than to try to decide this case before next Tuesday. It has been standing here for a long time, and I would like to decide it properly. So I would suggest, in order to give counsel plenty of time, that Mr. Woodward's memorandum

be in by December 28th. You will need lots of time in the next week, Christmas and all of that, and then if you will have your memorandum in, your answer, on January 6th of next year, I will study them as soon as I get back, and if I need the benefit of oral argument, I will notify counsel and the case will be set down for further argument. [146]

I, Elbert Cripps, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings held in Sacramento, California, U. S. District Court for the Northern District of California, Northern Division, on December 14, 1956, in Cr. No. 11,378, United States of America, Plaintiff, vs. Chow Ring Kew, Alias Sam Wahyou, Alias Donald Harold Wahyou, Defendant, before the Hon. Jon Wiig.

Aug. 8, 1956.

/s/ ELBERT CRIPPS.

[Endorsed]: Filed August 29, 1956.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS AT TIME OF JUDGMENT

Tuesday, June 26, 1956

Appearances:

For the Government:
ROBERT N. WOODWARD, ESQ.,
Assistant United States Attorney.

For the Defendant:
FORREST E. MACOMBER, ESQ., and
KENNETH G. McGILVRAY, ESQ.

Tuesday, June 26, 1956—Two o'Clock P.M.

The Clerk: Case No. 11,328, U. S. v. Chow Bing Kew, judgment, motion for new trial, and motion in arrest of judgment.

The Court: I was not aware of the recent motions that have been filed on behalf of the defendant until a short while ago, but I have gone over them.

I think all of the matters covered in the motion for new trial were substantially and very fully covered in your very capable memorandum filed.

Mr. Macomber: I think I have some new matters, your Honor.

The Court: If you have some new matters I will be very happy to hear you.

Mr. Macomber: Probably the main matter is this: 8 USCA, 1357, states:

"Any officer or employee of the service authorized under regulations prescribed by the Attorney General shall have power without warrant to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States."

That is the section quoted by your Honor in your Honor's opinion.

The Court: Yes. [2*]

Mr. Macomber: And I call your Honor's attention to the language of that section: It says "authorized under regulations prescribed by the Attorney General."

Now the regulations prescribed by the Attorney General are found in paragraph 242.11 of the Immigration and Nationality Act rules and regulations, and that regulation, as far as material here, reads as follows:

"242.11. Investigations. (a) Persons believed to be subject to deportation. The case of every person believed to be subject to arrest and deportation shall be investigated by such officer as may be designated for that purpose.

"(b) Purpose of investigation. The purpose of the investigation shall be to discover whether or not a prima facie case for deportation exists; that is, whether there credible evidence reasonably establishing that the person investigated is an alien and that he is subject to deportation.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

"(c) Recorded statement. Whenever in the course of an investigation information is obtained which indicates that the person investigated is subject to arrest and deportation, and it is desired to use such information as evidence in support of an application for warrant of arrest, such information shall be reduced to writing, either in narrative or question and answer form, and [3] signed by the person furnishing the information. Whenever such recorded statement is to be obtained from any person the investigating officer shall (1) identify himself to such person; (2) warn the person that any statement made by him may be used as evidence against him in any subsequent proceedings, and (3) place the person under oath or affirmation."

Of course, that was not done in this case.

Now, it will be observed that the jurisdiction of the Immigration Service is absolutely limited under 8 USCA 1357 to investigations authorized under regulations prescribed by the Attorney General, which, in plain language, excludes any other type of investigation.

The Supreme Court of the United States in Wixon v. Bridges, with which I am sure your Honor is familiar, as I read the case, reversed that case almost entirely upon the ground that although the defendant was under oath in that case the service did not comply with that regulation, and the Supreme Court held that they couldn't be used against him at all.

That is exactly the situation we have in this case, your Honor. That statement, since it was absolutely unauthorized, could not be used as the basis for any charge against the defendant, either in a deportation proceeding or in this proceeding. [4]

I call your Honor's attention to the fact that the Bridges case holds positively that compliance with the departmental regulations is obligatory; that the original deciding body is not the investigating or hearing officer, but the Board of Immigration Appeals, acting for the Attorney General.

That is another point. The Immigration Service could decide nothing in this case. They had no power of decision at all. That power resides only in the Attorney General, and he has delegated that power to the Board of Immigration Appeals. But it is still his decision to review it.

Now I have reviewed with many, many hours in the law library every case I could find on this point —I think I have read every one of them. I don't think any case has escaped me—and I can find no case which holds that in a case of this kind it is a violation of Section 1001 of 18 USCA.

If your Honor wishes, I can go all through here and I can distinguish every case that has been decided. As a matter of fact—of course, this statute has a more severe punishment than the perjury statute, and the Court, Judge Pickett, in United States v. Levin, in 133 Fed. Supp. 88, at 90, goes on to review all of the cases and points that out.

The Court: Yes.

Mr. Macomber: Your Honor is familiar with

that decision, and your Honor is familiar with the fact that in that [5] case Judge Pickett points out that this section in no wise applies in a case unless the defendant—we will say the defendant is claiming something from the United States, such as in income tax cases. It is absolutely mandatory to file an income tax return and pay the just taxes due thereon. Whenever you lie in an income tax case to an agent of the Federal Internal Revenue Service you are in effect making a claim upon the United States.

Now, this defendant in this case is under no legal obligation to speak. The emphasis is upon the legal obligation to speak. He doesn't have to talk to anyone unless there is some mandatory provision in the law requiring him to do so. He can, like I can myself, avail himself of the Fifth Amendment and refuse to discuss any matter with anyone unless there is some legal duty upon him. There is no legal duty upon this defendant, nor has there ever been, to speak. Certainly not without counsel being present, and so on.

Now, this regulation prescribed by the Attorney General, I believe, arises out of this: There were many, many charges against the Immigration Service of unfair dealings in taking statements, using statements, and so on. This regulation was promulgated by the Attorney General for the purpose of doing two things: One, protecting the United States against such charges of unfairness, and [6] protecting the defendant, protecting everybody con-

cerned. And I say it is the law of the United States Supreme Court under the Bridges case that this type of statement that was taken by Roy Anderson in this case cannot be used, cannot be used as the basis for any type of proceeding, whether in deportation or as a basis for a proceeding under 1001.

I say this, that no case can be found, as far as I can see, where there is a conviction under 1001 unless they complied with the conditions laid down by the judges in all these different cases—in Freidus against the United States, the Circuit Court of Appeals of the District of Columbia; in U. S. v. Stark, and other cases that I have cited to your Honor.

Now, all of these cases in which there has been a conviction have been cases such as the Brahma case, for instance, where Mr. Brahma was actually making a claim against the United States Government, a money claim.

The history of the section, of course, as your Honor knows, is the false claims to take money away from the United States, and then when they got into that hot oil controversy they amended it specifically so that it wouldn't have to be a money claim against the United States, it was designed to protect the United States from these hot oil affidavits, where they have to file an affidavit in order to produce a certain amount of oil. They file a [7] false affidavit so they can produce additional oil. And, of course, they are sworn statements and they are false, and they didn't require a money claim against the United States.

The cases such as Marziani against the United States, the Court in United States v. Guilliland, says about that type of case:

> "Here again the Marziani case does not present the particular situation in the instant case. What was upheld was the false statements made by Marziani in an interview which he requested"—emphasis on "he requested"—"for the purpose of affecting the proposed action of the State Department in requesting his resignation. He was an actor in that matter and volunteered the information. The subject matter of his retention or dismissal was clearly within the jurisdiction of the State Department, of which he was an employee at that time."

In other words, he was an actor and requesting them to act and they had the right to make the final decision. The Immigration Service never at any time and doesn't have the right to make any final decision in connection with Mr. Wahyou's alienage or citizenship or deportation. That is a matter of a recommendation and to be acted upon only by the Attorney General through the Immigration Board of Appeals. [8]

Now, the Court in that case that I have been quoting from says, at page 204 of the decision:

"Running through the whole act there seems to be discussed the congressional purpose to (1) protect the Government against false pecuniary claims, and (2) as stated in the Guilliland case, to protect

Government agencies from perversion of their normal functioning. The purpose seems to be to protect the Government from the affirmative or objective and voluntary actions of persons who take the initiative; or, in other words, to protect the Government from being the victim of compositive statement, whether written or oral, which has the tendency and effect of perverting its own proper activities.

"In the instant case the defendants did not volunteer information, they were not seeking an action by the Government or making any claim upon it, or for action by its officers against other persons. In this respect the present case is quite distinguishable from any adjudicated case which has been called to my attention.

"I conclude, therefore, that the legislative intent in the use of the word 'statement' does not fairly apply to the kind of statement involved in this case, where the defendants did not volunteer any statement or representation for the purpose of making claim upon, or inducing [9] improper action by the Government against others. Nor were they legally required to make the statements.

"The next question for determination is whether the alleged false answers given to FBI agents were in a matter within the jurisdiction of that agency."

The Court: That was an FHA case.

Mr. Macomber: Right, but they concluded, if your Honor will recall, that the FBI was an investigating agency, had no power to decide any matter, and under 1001 it was essential that the agency to

which the statement was given had jurisdiction to decide.

And, of course, we have the same situation here. The Immigration Service has no right to decide anything.

Of course, my main point is that this is squarely within the purview and the reasoning in the Bridges case, and this investigating officer had absolutely no right to take a statement in the manner in which he did, if he intended to use it in any way, in any proceeding.

The Court: Wasn't the statement in the Bridges case taken or purportedly taken pursuant to section 1357 or its predecessor?

Mr. Macomber: Its predecessor.

The Court: Its predecessor.

Mr. Macomber: Yes.

The Court: But not under a statute similar to 1001. [10]

Mr. Macomber: But the point is this: Any statement to be used as the basis for 1001 must be within the jurisdiction of the agency which takes the statement.

Now it certainly wasn't within the jurisdiction of the agency in this case, for this reason: Investigator Anderson had a right to proceed only in accordance with the provisions of the law. The Bridges case holds that regulation is absolutely a part of the law, has the full force and effect of the law.

They have gone further since the Bridges case. Since the Bridges case was decided, the Attorney

General, probably pursuant to the language of the Bridges case, has issued a regulation—first of all, Congress has given the Immigration Service only power to do an act in accordance with—not what they want to do, but in accordance with regulations prescribed by the Attorney General. Then the Attorney General says, "Well, let's keep this thing on an even keel," so he has made regulations which are designed for the protection of all concerned, and he gives them authority, but very limited authority. The authority he gives an immigration investigator is very limited, in accordance with the language I quoted in full in the early part of my remarks. It is right here if your Honor cares to read it.

Now that is exactly the Bridges case. No authority, no jurisdiction, no power of any kind to use this statement, [11] neither in an immigration proceeding nor in this court, and especially in this court.

The cases in U. S. v. Levin—that, to my mind, was a remarkable decision; the Judge went to an awful lot of trouble, because he reviewed every case, he took every case that had been decided up to that time and he correlated them and he expressed his views as to what the law was. I appreciate that that is not binding upon this court, that is a different circuit. But the Bridges case is a United States Supreme Court case.

Now this court in its opinion mentioned Knowles against the United States, a decision by Murrah, which was concurred in by Judges Pickett and

Phillips. That was an income tax case, and it comes within the purview of the Cohen against the United States case.

Now Judge Murrah, in his decision in the Knowles case, had this to say about—he reviewed Cohen against the United States and Marzani against the United States, and here is what he said about it:

"If the Court in the Cohen case intended to embrace the full sweep of the Marzani case, it was under no necessity of doing so in the affirmance of the conviction there, for there is undoubtedly a decisive difference in a voluntary, oral statement made to a superior officer in an informal interview, as in the Marzani case, [12] and a deliberate statement made by a taxpayer concerning his taxable income to a revenue agent who he knew was conducting an investigation of the correctness of his return.

"In any event, we recognize a valid difference in the two cases, and we prefer to place our affirmance of this judgment squarely upon the premise that the statement was made in pursuance of statutory requirements. Every individual having for a taxable year a gross income of a prescribed amount is required to make a return under penalty of perjury, and every person liable to pay any tax or for the collection thereof is required to keep such records, render under oath such statements, and comply with such rules and regulations as the Commissioner may determine.

In other words, the Court is pointing out the mandatory requirement to speak and to give true

information in the Marzani and Cohen and Knowles cases.

The Court: You don't think there was any obligation on the part of the defendant in this case to speak?

Mr. Macomber: None whatsoever, according to the Fifth Amendment.

The Court: Well, then, when he voluntarily makes a statement which is misleading, what is the situation there? [13]

Mr. Macomber: He didn't volunteer any information. They came to him and asked him. He wasn't a voluntary actor. He didn't go to the Immigration Service and say——

The Court: That is true.

Mr. Macomber: He was approached by an immigration investigator who knew he was governed by certain regulations, if he wanted to use any information he would have to follow that regulation to the "T." Of course, they did do that; they came to him later and did follow the regulations and he gave them a true and correct statement.

But this defendant in this case—the case I read to your Honor, if I understand it, involves where he is the actor in the case. He wasn't the actor in the case. The Immigration Service came to him and asked some questions. He merely answered the Immigration officer's questions; he wasn't a voluntary actor. He had no duty to speak.

The Court: I mentioned that rather briefly in my oral ruling—I mean my written ruling, he could have chosen to remain silent at that time, he had no

obligation to speak, but he not only spoke, but gave additional information, as I pointed out, which would tend to lead the immigration officers off on a trail that might end.

Mr. Macomber: But that was only in answer to an inquiry made of him. The Immigration Service were the actors in the case. They were asking him questions. [14]

Now I think this: That regardless of whether he volunteered any information at that time, the case comes within the rule of these cases; that is, first of all, he was not under oath, he was not required to speak, and if there was no requirement to speak he could lie to them all he wanted to, under these cases. He could tell them all the lies he could think of and it would not serve as the basis for a prosecution under 1001, nor would it serve as the basis for a prosecution under the perjury statute.

If they followed the regulations, which they were required to do, then it could serve as a prosecution under either.

The Court: It would certainly serve for prosecution under Section 1357.

Mr. Macomber: Yes, which is a much more—doesn't carry the penalty that 1001 does. And, as the Court points out, if there is a more drastic penalty involved the section must be a more drastic section and must be interpreted accordingly.

Now that is as to the second count of the indictment.

As to the first count of the indictment, there is one matter that I don't know whether it was made

plain to the Court. California used to have two different types of application—one for an on sale distilled spirits license, and another type of application for an off sale. In the [15] on sale type of license they required a statement as to citizenship.

The Court: Yes, I remember that.

Mr. Macomber: In the off sale they did not have any such statement in it. Then to save money, or for some reason, I don't know what it was, they did away with both types of application and just used one type of application for both types of license, one form of application for both types of license.

The Court: Where is that in the record?

Mr. Macomber: It isn't in the record, but——

The Court: Let's stay with the record.

Mr. Macomber: Well, I am speaking now of the law.

The Court: You are outside the record on that.

Mr. Macomber: Except this, that the law requires—does not require a statement of citizenship. If it will make any difference to your Honor's decision, I ask your Honor to reopen this case for the purpose of producing testimony to show what I said is true.

But there are two other matters about that. There was no intention to deceive, and, of course, there are some cases one way and some cases another way, a lot of them say there must be an intention to deceive. There could be no intention to deceive if it isn't necessary. It doesn't make any difference whether he is a citizen or non-citizen, the [16] State Board is not interested in that one bit as far

as an off sale license is concerned and don't pay any attention to that.

The Court: Well, that may be a conclusion on your part.

Mr. Macomber: But there is another thing. The record shows that this application at the time it was mailed in, and there is no conflict in the evidence about this, showed that it was for Daylite Market, and Daylite Market had had a sales tax license issued to the partners for many years. So this was a partnership application and a partnership can have no citizenship apart from the various persons composing the partnership.

So I say it was perfectly plain and apparent that this was a partnership application, and your Honor will recall the applicant was informed it wouldn't be necessary to list all the partners, that it would only be necessary to list one or two. But the name "Daylite Market" was not struck out when the application was sent in. There was no conflict about that. So this was a partnership application. It can't serve as the basis of claim of citizenship by one of the partners, as a matter of law.

The Court: Mr. Woodward?

Mr. Woodward: If the Court please, taking the matters up in the order that counsel has done so: First of all, to save my soul I can't find Section 242.11 in the [17] present Immigration and Nationality Act, which went into effect in December of 1952, and which is the applicable act that we are interested in—at least, not the part that counsel quoted.

In the second place, he quoted 242.11, which he has indicated he feels that Officer Anderson would have to comply with. In the first place, there is no holding out that this was any deportation hearing, that Officer Anderson ever had anything to do with deportation, was interested in it, or anything else. He testified that he was an inspector for the Immigration and Naturalization Service. And Section 1357 of Title 8, which is equivalent to 287 of the Immigration and Nationality Act, states that "Any officer or employee of the Service authorized under the regulations prescribed by the Attorney General shall have power without warrant (1) to interrogate any alien or person believed to be an alien as to his right to be in or remain in the United States."

The regulations define who are officers under the statute.

The Court: Are these the regulations that were in effect at the time Anderson interviewed the defendant the first time?

Mr. Woodward: Yes, at the time that the indictment——

The Court: Yes.

Mr. Woodward: Section 235 (a), in part, says, "The [18] inspection of, physical and mental examinations of aliens, including alien crewmen, seeking admission or readmission to the United States shall be conducted by Immigration officers, except as otherwise provided by special inquiry officers."

And then going to an earlier regulation, in 1.1 (11):

"The term 'immigration officer' means any officer or employee of the Service who on December 24, 1952, was serving under appointment theretofore made to the position of immigrant inspector, patrol inspector, detention officer, investigator or naturalization examiner, or any other officer in the service of a higher grade whose appointment has not terminated or who thereafter is appointed to such position."

And Mr. Anderson testified that he was acting in that capacity at the time he interviewed Mr. Wah You.

So I don't think there is any question but what as an investigator of the department he had authority under Section 1357 of Title 8 to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States. And that is exactly what Mr. Anderson did. He was not acting in any board of inquiry with respect to deportation or anything else, and all the to do and fuss about what is required in a deportation hearing, such as the Bridges case held, has no application whatsoever to the [19] case before your Honor. And the cases cited, of course, under that theory are not in point.

Now turning to 1001 which counsel mentioned, I don't think anything new has been added to what has already been briefed and what your Honor has stated in your memorandum, and therefore I won't belabor those issues, except to point out again that 1001 does not require that the Government or anybody else be actually defrauded out of money or

anything of value. That has been very definitely held all along, has been held by Judge Halbert, even, in this court in the Meyers case.

And then going back, as counsel concluded, to the first count under 911, he stated that the application was on behalf of the copartnership. It is my definite recollection that there was nothing whatsoever said about a copartnership on the face of the application, it was only in the individual's name, and the Daylite—speaking from memory from the date of trial, having not seen the exhibits since, it is my recollection that there is printed material thereon stating that if it is a partnership all the partners should be listed, or words to that effect. And there appeared only the name of the defendant.

So I don't feel that that argument holds any weight whatsoever.

Unless your Honor has some questions, I won't seek to [20] belabor the issues any further. I think we have covered it fully and completely heretofore.

Mr. McGilvray: May I reply just briefly?

The Court: Yes.

Mr. McGilvray: With reference to the Count 1, that the license application held—I have forgotten the number—but Mr. Macomber stated there was only one application. Perhaps it might be out of the record——

The Court: I don't want to go outside the record.

Mr. McGilvray: On this record there is an exhibit, Exhibit 1 it is, which says "Application for alcoholic beverage license," in parentheses "s,"

which indicates only one form of application, and then, of course, the law was conceded, if not conceded I am confident that for an off sale license citizenship is not required. I believe that was conceded at the time this was introduced.

The Court: I can't remember whether it was conceded or not.

Mr. McGilvray: At any event, that is the law of California, of which this Court can take judicial notice.

The Court: It was cited in your memorandum and I followed it. I don't doubt that the law was quoted correctly.

Mr. McGilvray: But it is type of license application that is universal. Certainly evidence could be brought in, but I think it speaks for itself, that they have only one form [21] and that is all they have. Perhaps it is outside the record, but I am confident about this. There were some exhibits and there was evidence that it was a partnership.

In conclusion, I just want to call to your attention that the United States Attorney did not make any reply to the argument on the Bridges case.

The Court: When I took this case home with me last March I did not just sit on it. My law clerk and I worked on it for many, many hours, and I did the final work, and consumed a great deal of time before I came to the conclusions that I came to in my written ruling. I was mindful of the fact that the defendant was willing to come before me and try the case and not sit before a jury.

I, in reviewing the evidence, the documentary evi-

dence and the testimony of the witnesses, accorded the defendant the benefit of the doubt as to facts, and when I arrived at the facts which I found to be true, the application of them was not as simple as it might have been, and in writing the ruling I am certain I considered all the matters which you have raised in your motion for new trial and your motion for arrest of judgment. I do not feel that there is anything new that has been brought up which would warrant the Court in granting the motions, and they will be denied.

Mr. Wah You, is there anything you wish to say to the Court before the Court imposes sentence? [22]

Mr. Macomber: No, your Honor.

The Court: Do counsel wish to speak in his behalf?

Mr. Macomber: Well, I have an application for an order recommending to the Attorney General that the defendant be not deported on account of these two convictions, but I would like to offer that for your Honor after his sentence.

The Court: Then there is no further statement that you or the defendant wish to make before the Court imposes sentence?

Mr. Macomber: No, your Honor.

The Court: I learned a good deal about the defendant Wah You during the course of the trial and reading the record. I have a very complete presentence report furnished by the Probation Officer.

All sentences, as far as I am concerned, are difficult. This one is a great deal more so because of the

fact that there is now pending, as I understand it, a proceeding instituted for deportation, is that correct?

Mr. Macomber: Yes, your Honor.

The Court: If that were to become effective and he were deported and taken away from his wife and children it would be more serious punishment than I could award within the maximum punishment provided by law for the two convictions——

Mr. Macomber: It certainly would.

The Court: ——that I have found him guilty of. But [23] with his able counsel and the discretion that rests with the Attorney General, and his means, he can seek all possible assistance to avoid deportation. I do not know whether he can do it or not, but that is not in my jurisdiction.

I do not like to be vindicative and I do not think that I am, but I have a strong feeling in a case of this type of Mr. Wah Yous, where you as an alien came to our shores and by virtue of your inherent ability, intelligence and astuteness have been able to acquire a fortune which undoubtedly is greater than that of any one else in this courtroom in terms of money, and not be more responsive to your duties as an alien friend within the boundaries of the United States. You have not treated Uncle Sam fairly, but at the same time you have been taking all of the benefits and rights.

I do not mean to forget that you have done a lot in your community to help other people. You raised your children to be good American citizens, and I think that if you were placed on probation you

would comply with the terms and conditions of probation. There is no reason in God's world why you should not, because you were already on a spot prior to the time this case was ever tried. So probation would not be the arrangement.

If you should be fortunate enough to suffer the punishment which I am to award in this case I think you [24] would be one of the luckiest persons in our whole country.

As to count one of the indictment it is the judgment and sentence of the Court that you be committed to the custody of the Attorney General for confinement for a period of eighteen months and that you be fined the sum of $5,000.

As to count two of the indictment it is the judgment and sentence of the Court that you be committed to the custody of the Attorney General for confinement for a period of eighteen months and that you be fined the sum of $5,000.

The periods of confinement on counts one and two of the indictment shall run concurrently.

Now is there any reason why the commitment should be stayed in this case?

Mr. Macomber: Yes, your Honor.

Probation Officer Roach: Your Honor, may I make a remark?

The Court: Yes.

Probation Officer Roach: I believe in count one the maximum fine that can be imposed is $1,000.

The Court: What is that?

Probation Officer Roach: In count one I believe the maximum fine is $1,000.

The Court: Oh, I am sorry if I——

Mr. Woodward: I believe that is correct.

The Court: You are right. As to count one the fine [25] is $1,000, not five. On that slip that you handed me it said 10,000. So I apologize to the defendant and counsel.

Mr. Macomber: May I make my motion or application for an order at this time?

The Court: Yes.

Mr. Macomber: This defendant was arrested on a deportation warrant on June 10, 1953. As yet no hearing has been held on that warrant.

There is a statute, 8 USCA, 1251 (b), with which I am sure your Honor is familiar. It is my contention that that statute was advisedly put into the law so that in a proceeding of this kind, where this defendant has been convicted of two crimes, such as in this proceeding, the Court could and should weigh the matter. Because when it gets up to deportation proceedings there is little to be weighed. They are bound by the court proceeding, and if this court doesn't recommend, why, in my opinion the defendant would have little chance to stay in this country. That provision was put in the law and supposed to be acted upon in a proper case.

I think this is a proper case, for this reason: This man, outside of this matter before the Court, is a wonderful citizen. Everybody in Stockton speaks most highly of him. The defendant has done things that are not known to the public, that might be known to the Probation Officer and conveyed to your Honor. [26]

He has a lovely wife and two fine children, both of them born in Stockton.

If he is deported where is he going to go? To Communist China? That is worse than death.

The Court: Is his home land within Red China?

Mr. Macomber: Yes, your Honor, but he came to this country as a child. He was 17 or 18 years old when he came here, and certainly he has no ties with China. Is he going to Formosa, an island of orphan souls? No room there for such as him. It is worse than a living death to be deported.

He has chosen this country, and, by the way, I have a little different view of this case, naturally, than your Honor has. If he came here as an alien and had told me—I thought he tells me everything; for 20 years I have been his lawyer—if he told me he was an alien and would like to visit Mexico or China or some other place, that would be an easy matter. He could do two things: Obtain a re-entry form and then he could become a naturalized citizen, no trouble about that that I can see at all.

He hasn't done this thing, told these lies, for the purpose of gaining something he couldn't have gained without making an untruthful statement. Of course, that leads me to believe that in spite of the fact he has made money he is not as literate as he appears to be.

He relied upon a proceeding—who knows what an [27] adoption proceeding is and whether it has been conducted properly, and so on. And these children that are adopted, they don't know, themselves, what their right name is, who their right parents

are, and so on. They are taught to tell a lie, they are instructed to do that.

But this is the place, as I see it, where this defendant can get at least something from this government. He wants to be here. Of course, he may not be able to stay here, but he wants to stay here and he wants to do something for the Government, too. And if this Court was to deny this request I think that the Immigration Service would have almost no alternative but to deport him, because this would be binding on them. Under two convictions, under the law as it reads, he couldn't ask for clemency and expect to get it. He could get it only if your Honor made an order recommending to the Attorney General that the defendant be not deported under these two convictions, and I earnestly request that your Honor make such recommendation.

The Court: Mr. Woodward?

Mr. Woodward: Yes, your Honor. As your Honor knows, it is not the policy of the United States Attorney's office to make recommendations; but I would like to express the view of the Immigration and Naturalization Service with respect to this particular section, which is 1251 (b) of Title 8. In that section apparently the Court is given discretion [28] to make such a recommendation to the Attorney General if he sees fit.

It is the feeling of the Immigration and Naturalization Service that deportation is strictly an administrative matter under their control. The particular section that is limited is A-4, which is only

one of the many grounds of deportation. They feel that they should not be hampered in their review of their action with any factors that might be helpful to them in determining whether or not an individual should be deported.

I think it is obvious that the Service is not going to treat Mr. Wah You or any other alien unfairly, and there is the practical problem of whether or not he could even be deported; but that is something for them. The relatively recent case of Jay v. Boy Hong, while not in point, I am not citing it as that, is an indication that the Supreme Court feels that the administrative function of deportation should not be unduly hampered by rulings of the Court. As I say, I am not quoting that as being on point, but it is, at least, analogous. And that is the view of the Service, your Honor.

Mr. Macomber: I can only repeat that that section was put in there by Congress for this purpose.

The Court: I have had numerous cases where the only time the question of deportation came up was because of a conviction before me, and I have declined to make a [29] recommendation that the accused not be deported, for reasons which were apparent to me in those cases.

This case presents quite a different problem from any that I have ever had, and the record shows here that there was a proceeding instituted in June of 1953, which had nothing to do, as far as I know, with the present case.

I think there is some merit in the proposition in a case of this type, where there is already pending,

that it can be handled better administratively, and for this court to make a recommendation one way or the other—certainly, if I were to decline to make a recommendation it would in effect be an order of deportation, and if I were to make a recommendation that this defendant not be deported, I think in this case I would be unduly interfering with the executive department in carrying out its functions on a proceeding which is already under way. Therefore, I will make no recommendation. The matter can be handled by the administrative authority, namely, the Attorney General in the Department of Justice.

Now we will go back to the question of a stay.

Mr. Macomber: If the Court please, the defendant has been a resident of the United States for over 25 years, since he was 18 years of age. He has been out of this country just twice—once for a three months pleasure trip to China in 1947, and once for one day to Mexico on a business [30] trip in 1952.

He was married on June 30, 1938. He has lived with his wife continuously since that time. He was married in Reno, Nevada, and has two children born in this country, one born in 1939, Susy, and another in 1954, Sam.

The records disclose that he is a person of good moral character outside of this conviction. Witnesses have testified for him and others have got in touch with the Probation Officer.

The Court: And there were many letters at-

testing his good reputation attached to the Probation Officer's report to me, which I read.

Mr. Macomber: He is also the active manager of a number of enterprises that depend upon him solely for their management. When he went to China in 1947 there were very serious consequences as far as continuation of some of these businesses were concerned.

As your Honor knows, I take a different view of the law then that announced in your Honor's decision. I think this case is governed by the Bridges case and that these convictions cannot stand upon appeal on account of the decisions that I cited. So it is my intention to file an appeal forthwith, and I ask that your Honor permit the defendant to bail pending that appeal because there is a very substantial question of law involved, as your Honor has stated. [31]

The Court: The amendment to that rule going into effect next month, July 9th, as I understand it, is bail shall be granted pending appeal if it appears to the Court that the appeal is not for the purpose of delay or frivolous. I don't think that your contentions are frivolous at all. You are very serious and very persevering in making them to me.

I will allow the defendant to be released on bail pending appeal, provided the appeal is perfected and completed expeditiously.

Mr. Macomber: I will file a notice today. I came here prepared for any eventuality. Of course, I expected to take the defendant out of here by the hand, but in view of the events that have transpired I have the appeal ready to file.

The Court: You certainly are well represented, Mr. Wah You. You are very fortunate.

Mr. McGilvray: A transcript has been prepared, your Honor. A copy of that was for the Court. Is that back here?

The Clerk: Not all.

Mr. McGilvray: Not all?

The Court: Not all. Just two witnesses.

Mr. McGilvray: We will have to have it written up.

The Court: Yes. It was not a complete transcript.

What is the amount of the bond now?

Mr. Macomber: He put up $5,000 Treasury Certificates with the Immigration Service, and of course he is trying to [32] stay in this country, not leave. So your Honor continued him on that bond.

Mr. Woodward: It is my understanding, your Honor, there is $5,000 bond.

The Court: That is right. Very well, supersede as bond will be fixed in the amount of $5,000.

Certificate of Reporter

I, Clarence F. Wight, Official Reporter, certify that the foregoing, pages 1-33, is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ CLARENCE F. WIGHT.

[Endorsed]: Filed August 29, 1956. [33]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated.

Indictment
Ruling on motions for judgment of acquittal
Judgment
Minute order of June 26th, 1956
Judgment and commitment
Motion for a new trial
Notice of motion for a new trial
Motion in arrest of judgment
Notice of motion in arrest of judgment
Notice of appeal
Designation of contents of record on appeal
Affidavit for extension of time to docket appeal
Order extending time to docket appeal
Plaintiff's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11
Defendant's exhibits A, B, C, D and E
One (1) volume Reporter's Transcript of the trial
One (1) volume Reporter's Transcript on proceedings at the time of judgment.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 29th day of August, 1956.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 15251. United States Court of Appeals for the Ninth Circuit. Chow Bing Kew, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed August 30, 1956.

Docketed: September 4, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15251

CHOW BING KEW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division

CONCISE STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY, AND DESIGNATION OF RECORD

As to the First Count of the Indictment—a violation of 18 USCA 911, in that the Appellant falsely represented himself to be a citizen of the United States:

The evidence introduced by the Government in support of this Count was a photostatic copy of an application for an alcoholic beverage license in which the question "are you a citizen of the United States" was answered "yes."

Appellant was not guilty of this Count for the following reasons:

(a) The application was made on behalf of a partnership consisting of sixteen (16) persons, and a partnership has no citizenship;

(b) The application form was a single form to be used for both On-Sale and Off-Sale Licenses, and this question applied solely to an application for an On-Sale License and did not apply to an Off-Sale Beer and Wine License. This application was for an Off-Sale Beer and Wine license, and citizenship was immaterial for this type of license, in that the law of California did not require citizenship as a prerequisite to granting the license;

(c) The uncontradicted evidence showed that the application was signed by Appellant at the request of the partnership's Supervisor of Markets without Appellant reading the same;

(d) There was no intent to mislead anyone and no one was misled.

As to the Second Count of the Indictment—a violation of 18 USCA 1001, false statement to one Anderson, an Investigator of the Immigration Service:

The statement alleged to have been made by Appellant to Anderson did not constitute a violation of 18 USCA 1001 because:

(a) Anderson, the Immigration Investigator, had no power to interrogate any person without full compliance with 8 USCA 1357 and Paragraph 242.11 of the Immigration and Nationality Act Rules and Regulations, and admittedly did not comply with those provisions in any manner;

(b) The Immigration Service and its Investigator were not acting in a matter within their juris-

diction within the meaning of Section 1001 because they were (1) conducting a preliminary investigation to determine if they had jurisdiction; and (2) they had no power to decide;

(c) The answers made by the Appellant were not statements within the jurisdiction of the Immigration Service within the meaning of Section 1001 in this, the Appellant was under no legal obligation to speak or to give information to the Immigration Service. It was not a voluntary statement or a statement designed for the purpose of inducing action by the Government;

(d) The judgment of conviction is not supported by the evidence, in this, the Government's proof consisted solely of testimony by the Investigator, Anderson, and his testimony was impeached and contradicted in all material respects by his own written memorandum made at the exact time of the alleged statement;

(e) The case comes squarely within the rule of law announced in Bridges vs. Wixon, 326 U.S. 135, that compliance with departmental regulations is obligatory, and the trial court erred in denying Appellant's motion for a judgment of acquittal;

(f) Appellant's conviction by the trial court under the facts of this case destroys the age-old conception of the crime of perjury;

(g) The judgment of conviction was not supported by the evidence, in this, the evidence shows that the Appellant made no fraudulent claim to citi-

zenship because he believed in good faith that he was a bona fide citizen of the United States ever since the year 1934 and had good and sufficient reason for so believing.

As to Both Counts of the Indictment:

(a) The trial court erred in refusing to take jurisdiction of Appellant's application under 8 USCA 1251(b) for an order recommending to the Attorney General that the Appellant be not deported on account of these two convictions;

(b) The punishment imposed upon Appellant by the trial court under the circumstances of the case was cruel and unusual and constituted an abuse of discretion;

(c) The trial court erred in denying Appellant's motion for a new trial on all of the grounds hereinbefore stated.

Designation of Record

Appellant in this appeal relies upon the whole record and hereby designates as material to the consideration of this appeal all of the record, including all of the exhibits introduced in evidence, all of the oral testimony, arguments and rulings on (a) motion for judgment of acquittal; (b) motion for new trial; (c) motion in arrest of judgment; and (d) application under 8 USCA 1251(b) for an order recommending to the Attorney General that the Appellant be not deported on account of these two convictions.

Appellant likewise requests that a photostatic copy of Plaintiff's Exhibit 1 (Application for alcoholic beverage license) be made a part of the printed record.

Dated: September 6, 1956.

/s/ FORREST E. MACOMBER,

/s/ KENNETH G. McGILVRAY,
Attorneys for Appellant.

Affidavits of service by mail attached.

[Endorsed]: Filed September 7, 1956.

SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JUL 16 1957
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 297

CHOW BING KEW,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No.

CHOW BING KEW,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 20, 1957.

OPINIONS BELOW.

The opinion of the District Court, entitled "Ruling on Motions for Judgment of Acquittal" (R.5-14) is officially reported in 141 Fed. Suppl. 253. The opinion of the United States Court of Appeals for the Ninth Circuit (R.198-203) has not as yet been officially reported. The latter opinion and the judgment of the Court are printed in Appendix A, infra, pp. i-ix.

JURISDICTION.

The judgment of the United States Court of Appeals was dated May 20, 1957 and was entered on that date (R. 204). Petition for rehearing was denied on June 18, 1957 (R.205). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED.

Where, after the decision of this Court in the *Hartzel* case,[1] Congress in the 1948 revision substituted the word "willfully" for the word "knowingly" in 18 USCA Section 911:

1. Can a conviction stand where the indictment charges that the petitioner did "knowingly" falsely represent himself to be a citizen of the United States without charging him with "willfully" doing so, and where the trial court (sitting

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[1] *Hartzel v. United States*, 322 U.S. 680, 64 S. Ct. 1233, 88 L. Ed. 1534.

without a jury) found that the offense could be constituted from carelessness of the defendant in signing unread a business document which contained such a representation?

2. Could the Court of Appeals disregard the trial court's erroneous conclusion that the offense could be constituted from carelessness, and sustain the conviction on the basis that proof of other misrepresentations by petitioner could negate the defense of ignorance?

3. Did the Court of Appeals further compound the error of the trial court by holding that no fraudulent purpose nor pertinency of the statement need be shown?

STATUTE INVOLVED.

The statute involved is 18 USC Section 911 which provides as follows:

> "Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE.

Petitioner was convicted by the District Court (sitting without a jury) under an indictment which charged that he knowingly and unlawfully falsely

represented himself to be a citizen of the United States.[2] In the language of the trial court:

> "The Government's proof on this count consisted of an application for a California alcoholic beverage license filed January 18, 1952, signed by the defendant. In response to a question contained in the application, 'Are you a citizen of the United States?' the word 'yes' had been typed. Defendant admits he is not a citizen of the United States." (R.5)

A reproduction of the application appears in the record (R.30).[3] It was made on behalf of the Daylite Markets, a partnership (R.97-98, 100-101). The circumstances of its execution are thus stated in the opinion of the Court of Appeals:

> "One Helton, who was supervisor of the partnership's many stores, seeking a renewal of the five dollar state license to sell alcoholic beverages at the partnership's Oakley store applied therefor to the office of the State Board of Equalization at Martinez. Helton testified that a clerk in the office of the Board typed up an application form to be signed by appellant, and advised Helton that the form required the verified signature of a member of the partnership. Although California law requires that the names of all partners appear on the form, only appellant's name was typed thereon by the clerk who further typed 'yes' on the form in answer to the printed question. 'Are you a

[2]Conviction on another count was reversed by the Court of Appeals for failure to charge petitioner with an offense.

[3]The deletions and interlineations thereon were made sometime after it was filed with the State licensing authorities (R. 99).

citizen of the United States?' Helton stated he then took the filled-in application to appellant's office where, without reading it, appellant signed it. Thereafter Helton took it to a notary who signed the form's verification though appellant never appeared before him. Helton thereafter mailed it to Sacramento" (R.201).

Petitioner was a partner in the concern, and as president of several corporations was engaged in various legitimate business enterprises (R.110, 131). He signed two or three hundred business documents a week (R.125). This particular application was for an "Off Sale Beer and Wine" license (R.30, 99). The law of California (Business and Professions Code, Section 23788) does not require that a holder of this particular type of license must be a citizen (R.5).[4] The partnership held a sales permit issued by the Board of Equalization which showed the names of the partners (R.155), some of whom were citizens (R.154-155), and in the application itself (R.30) the Board's clerk typed a specific reference to this Seller's Permit No. C-64064. It was thus well known to be concerned that this application was for the Daylite Markets and not for petitioner personally.

Petitioner waived a jury and on May 28, 1956 the District Court filed (a) its decision entitled "Ruling

[4]Since citizenship of the applicant for the "Off Sale Beer and Wine" license was immaterial under the law, the question relative thereto was inapplicable, and the Board clerk who typed the form could have omitted that particular item, as several other inapplicable items were omitted (R. 30).

on Motions for Judgment of Acquittal" (R.5-14), and (b) its "Judgment" reading as follows:

"Judgment

"In accordance with the findings of fact and conclusions of law contained in the ruling on motions for judgment of acquittal filed herein, it is the judgment of the court that the defendant is guilty as charged in counts one and two of the indictment.

"Further, it is ordered that the defendant be referred to the Probation Office for a presentence report, and the time of sentence is tentatively set for June 26, 1956, at 2 p.m. in the United States Courthouse in Sacramento, California" (R.14-15).

The said findings of fact and conclusions of law contain the finding and conclusion that petitioner "is in no position to relieve himself of criminal responsibility because of claimed ignorance. On the contrary, his brash carelessness, if such be the case, emphasizes his criminality" (R.8).

Thereafter, on June 26, 1957, the Court pronounced sentence of eighteen months' imprisonment and $1,000 fine on this count and filed a "Judgment and Commitment" (R.20-22) reciting the conviction and sentence.

The Court of Appeals affirmed the conviction on this count, holding that although the mere signed document did not itself prove willfulness, evidence of other misrepresentations described in the opinion was admissible to negate petitioner's contention that he signed it inadvertently (R.202; Appendix A, infra, p. vi), that

the trial court had made a finding of willfulness in that the "Judgment and Commitment" entered on June 26, 1956 recited (R.21) that petitioner had been convicted of the offense of violation of 18 USC 911 in that he " * * * did knowingly and unlawfully falsely represent himself to be a citizen of the United States. * * *" (R.203; Appendix A, infra, p. viii), that a fraudulent purpose was not necessary to the offense charged and that "willfully" as used in Section 911 means only that it must be proved beyond a reasonable doubt that the misrepresentation was voluntarily and deliberately made (R. 200; Appendix A, infra, p. iv).

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals is in conflict with applicable decisions of this Court. Where the word "willful" appears in a criminal statute, it implies not only knowledge of the thing but a determination with a bad intent to do it; i.e., "knowledge and a purpose to do wrong" (*Spurr v. United States*, 174 U.S. 728, 19 S. Ct. 812, 815, 43 L. Ed. 1150). It means an act done with a bad purpose and evil intent (*United States v. Murdock*, 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381). The requirement of a specific intent springs from the statutory use of the word "willful," and thoughtlessness, carelessness, or even recklessness are not substitutes for the more specific state of mind which the statute makes an essential ingredient of the crime (*Hartzel v. United States*, supra). The trial court and the Court of Appeals fell into the error con-

demned by this Court in *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288, of enlarging the reach of an enacted crime by constituting it from something less than the incriminating components contemplated by the words used in the statute.

The Court of Appeals was in error in concluding that the trial court had made a finding of willfulness. The Court of Appeals based its conclusion in that respect on the recital in the so-called "Judgment and Commitment" entered on June 26, 1956 (R.20-22), that the defendant had been convicted of "knowingly and unlawfully" falsely representing himself to be a citizen. As shown under the preceding subdivision of this petition, this was a mere recital (at the time of imposing sentence) of the steps previously taken by the court, and happened to be couched in the language of the indictment. The Judgment entered on May 28, 1956 constituted the finding of guilt and was expressly based upon the "findings of fact and conclusions of law contained in the ruling on motions for judgment of acquittal" (R. 14-15). Those findings of fact and conclusions of law contain the express conclusion that petitioner "is in no position to relieve himself of criminal responsibility because of claimed ignorance. On the contrary, his brash carelessness, if such be the case, emphasizes his criminality" (R. 8).

> "When such a misapprehension of the law has led both courts below to adjudicate rights without considering essential facts in the light of the controlling law, this Court will vacate the judgments and remand the case to the District Court for

further proceedings consistent with principles laid down in this Court's opinion."

Maggio v. Zeitz, 333 U.S. 56, 77, 68 S. Ct. 401, 412, 92 L. Ed. 476, 492.

Not only did the Court of Appeals ignore the error of the trial court in concluding that the offense could be constituted from carelessness, but the indictment itself failed to allege the statutory ingredient of willfulness and that essential ingredient appears to have been lost sight of throughout the entire proceedings. In this respect the decision is not only in conflict with the applicable decisions of this Court, but is in conflict with the decisions of other Circuits holding that where the word "willful" is used in the statute its omission from an indictment is fatal. (*Martiney v. United States* (CA 10) 218 F. 2d 256, Cert. denied 348 U.S. 953, 75 S. Ct. 442, 99 L. Ed. 745; *Pullen v. United States* (CA 5) 164 F. 2d 756.)

A mere subsequent recital by the trial court (in the language of the indictment) that petitioner had been convicted of "knowingly" making the misrepresentation would not dispel the vice of the conclusion that carelessness was synonymous with guilt, particularly since the word "willfully" in a statute means something not expressed by "knowingly" (*United States v. Illinois Cent. R. Co.,* 303 U.S. 239, 242-243, 58 S. Ct. 533, 535, 82 L. Ed. 773; *Hartzel v. United States,* supra; *Spurr v. United States,* supra).

The Court of Appeals properly held that the mere signing of the document by petitioner was insufficient

to prove willfulness.[5] The Court, however, fell into the error of holding that proof of other misrepresentations by petitioner could supply the missing ingredient and could refute the defense (borne out by all the uncontradicted testimony) that he signed the particular document in question without reading it and without knowledge that it contained the representation charged. The Court held in effect that the lack of evidence that petitioner had made the representation at all, could be supplied by showing that he made other representations at other times, thus in effect convicting him of the offense charged on the basis of proof of other acts. While it is true that under certain circumstances, proof of similar acts is admissible as tending to prove intent, this is only so where the doing of the act charged has been established by other evidence, and the proof is received only as bearing upon the state of mind which accompanied the doing of the act. Here the act charged is not the signing of a document but the making of a representation. Proof of other acts can never prove the doing of the act itself (Cf. *Wigmore on Evidence,* (3rd ed.) Vol. II, pages 200, 257). Evidence of other representations made by petitioner at other times afforded no legal inference that he made the particular representation charged in the indictment, and he was entitled to be tried only for that offense (Cf. *Boyd et al. v. United States,* 142

[5]Any possible inference of willfulness arising therefrom disappeared when the defendant produced substantial evidence to the contrary (*Comm. of Internal Revenue v. Bain Peanut Co.* (CA 5) 134 F. (2d) 853, 855; *Silverton v. Valley Transit Co.* (CA 9) 237 F. (2d) 143).

U.S. 450, 458, 12 S. Ct. 292, 295, 35 L. Ed. 1077, 1080). That he was not so tried appears to be clear from the trial court's conclusion that his ignorance, if due to carelessness, "emphasizes his criminality" (R. 8). If petitioner was ignorant of the fact that the representation was contained in the document, even though he were careless in signing it unread, no "criminality" would be involved, and there would be no "criminality" which could be thereby emphasized.[6]

The error of the Court of Appeals goes far beyond merely an erroneous evidentiary ruling. The Court of Appeals, disregarded the fact that in the trial court the petitioner was tried and adjudged guilty upon the fictitious issue of carelessness rather than upon the statutory issue of willfulness. In this respect we submit that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the trial court as to call for an exercise of this Court's supervision.

The Court of Appeals in its decision has also decided an important question of Federal law which has not been, but should be, settled by this Court. The decision of the Court of Appeals not only holds that to constitute a violation of 18 USC 911, no fraudulent purpose is required to be shown, but in effect has gone further and determined that a false representation as

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[6]Other remarks of the trial court (R. 180-181) in denying probation and imposing sentence also indicate that the court was unconsciously influenced by considerations other than petitioner's connection with the particular offense charged.

to citizenship, even though made in a matter in which it is entirely immaterial, would constitute a violation of that Section.

The Court of Appeals has rested this interpretation largely upon cases construing the former statute (8 USC, former Sec. 746). The Court has disregarded the significance of the statutory change in 1948 which substituted the word "willfully" for the word "knowingly." In substituting the word "willfully" for the word "knowingly" in the statute, Congress could not have been unaware of the fact that this Court in the cases heretofore cited had interpreted the word "willfully" as requiring a specific intent and purpose not expressed by the word "knowingly." It is true that in the 1940 enactment (8 USC, former Sec. 746) Congress had dropped the words "for any fraudulent purpose" from the earlier statute and had simply provided that the representation must be knowingly and falsely made. However, when Congress in the 1948 enactment of the statute in its present form substituted the word "willfully" for the word "knowingly" it quite obviously intended to embrace the ingredient of bad intent or wrongful purpose.

Congressional history supports the view that in the 1948 revision of Title 18 USC by the substitution of the word "willfully" for "knowingly" it was intended to include as an essential element a fraudulent intent as well as a material purpose; i.e., in a material matter. (See House Report No. 304, 80th Congress; Report from the Committee on Revision of Title 18.): In Section 912, the words "with the intent to defraud

the United States or any person" contained in said Section 76 of Title 18 USC, 1940 edition, were omitted as meaningless, in view of *United States v. Lepowitch,* 63 S. Ct. 914, 318 U.S. 702; in Section 2273, the words "with intent to destroy the same, sets fire to any such vessel, or otherwise" following "willfully" and preceding "attempts" were omitted as surplusage; in Section 2314, the words "or with intent to steal or purloin, knowing the same to have been so stolen, converted or taken" were omitted as surplusage since property so "taken" is "stolen" and insertion of the word "knowingly" after "whoever" at the beginning of Section renders such omission possible.

The effect of the decision below is to sustain a conviction under 18 USC Section 911 without either allegation or proof of the statutory ingredient of willfulness, to sustain a conviction for willful misconduct where the trial court found that carelessness would suffice and to hold that neither materiality, fraudulent intent or bad purpose is required to be shown, even though willfulness is a statutory ingredient of the offense charged. Such a holding conflicts with applicable decisions of this Court and of Courts of Appeals in other Circuits, as hereinabove pointed out. It also involves an important question of Federal law, to wit, the proper interpretation and scope of 18 USC Section 911, which has not been settled by this Court, and which should be settled.

The application given to this statute by the courts below would make possible the conviction of any business man who happened inadvertently to sign a docu-

ment containing some material of which he was unaware, if such material were found to be untrue. The need for clarification of the scope of the statute appears to be pressing, in view of the interpretation given to it in the instant case. That interpretation goes to the extent of applying it to a situation wherein the material has been supplied by persons other than the defendant, wherein the particular statement had neither pertinency nor the sanction of any official requirement,[7] wherein the particular question on the form was in fact entirely immaterial to the type of license which was being applied for, and in effect would apply the statute to any representation however careless, inadvertent or innocuous, even where the statement could have had no possible effect upon the matter in which it was made.[8]

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[7]The very recent decision of this Court in *Watkins v. United States* (decided June 17, 1957) 25 L. W. 4510, demonstrates that individuals are not to be subjected to criminal penalties for ostensible transgressions arising out of irrelevant inquiries directed to them by some public instrumentality where the question is in no way related to the subject-matter involved.

[8]The legislature of California has laid down California public policy in enacting the Alcoholic Beverage Control Act (Business and Professions Code, sec. 23000 et seq.) which requires that holders of "On Sale" (bar and restaurant) licenses must be citizens of the United States but which provides no such restriction relative to "Off Sale Beer and Wine" licenses, as many grocery stores usually dispense such beverages for consumption off the premises and many grocery storekeepers are non-citizens. The question referred to in the application form, therefore, had no pertinency whatever to the license being sought. The applicable provisions of the California statute are printed in appendix B, *infra*, p. x.

CONCLUSION.

In the interests of justice and much needed clarification of the statute involved here, as well as the proper interpretation of the word "willfully" when used in a criminal enactment of this nature, we respectfully submit that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
July 10, 1957.

ARCHIBALD M. MULL, JR.,
FORREST E. MACOMBER,
KENNETH G. MCGILVRAY,
Counsel for Petitioner.

ARTHUR J. PHELAN,
Of Counsel.

(Appendices A and B Follow.)

Appendix A

United States Court of Appeals for the Ninth Circuit

Chow Bing Kew,	Appellant,	No. 15,251
vs.		May 20, 1957
United States of America,	Appellee.	

Appeal from the United States District Court for the Northern District of California, Northern Division

Before: DENMAN, Chief Judge and BONE and FEE, Circuit Judges

DENMAN, Chief Judge:

Chow Bing Kew, hereafter Chow, appeals from his conviction in the District Court for the Northern District of California, Northern Division, of a violation of Section 911 of 18 U.S.C. in January, 1952 and of a violation of Section 1001 in April, 1953. He was sentenced to 18 months in prison for each of the two offenses, the sentences to run concurrently, and fined $1,000 on the first and $5,000 on the second. The case was tried without a jury and no findings were requested. F.R.Crim.P. § 23 (c).

The indictment, consisting of two separate counts, one charging the 1952 violation of Section 911, Title 18 U.S.C. and the other the 1953 violation of Section 1001, Title 18 U.S.C., reads as follows:

"THE GRAND JURY CHARGES:

Count One: That CHOW BING KEW, alias SAM WAHYOU, alias DONALD HAROLD WAHYOU, (hereinafter called "said defendant"), heretofore, to-wit: On or about January 18, 1952, at Stockton, County of San Joaquin, State and Northern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did knowingly, and unlawfully falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States (18 U.S.C.A. 911).

THE GRAND JURY FURTHER CHARGES:

Count Two: That on or about April 14, 1953, at Stockton, County of San Joaquin, State and Northern Division of the Northern District of California, and within the jurisdiction of this Court, [no one] did unlawfully, knowingly, and wilfully falsify, conceal, and cover up by trick, scheme, and device a material fact and made a false, fictitious and fraudulent statement or representation to Roy R. Anderson, an investigator of the Immigration and Naturalization Service of the Department of Justice, a department of the United States, by telling him he was a citizen of the United States of America, knowing such statement or representation to be false, fictitious, and

fraudulent in that he was not a citizen of the United States of America. (18 USCA 1001.)

A TRUE BILL
/s/ Royse Clayton
Foreman"

Since no one is named as committing the crime in the second count, the district court had no jurisdiction in personam to try Chow.[1] Undoubtedly it was intended by the phrase "(hereafter called said defendant)" in the first count that the words "said defendant" would be inserted before the words "did unlawfully" etc., of the second count. The trial court cannot supply the omission and thus create jurisdiction. Nor can the defendant in effect indict himself by treating the second count as if he were therein named.

The judgment on this second count is reversed and is ordered dismissed.

1. *Did Chow make a Willfully False Representation of Citizenship in Violation of Section 911, Title 18, U.S.C.?*

Section 911, as far as pertinent, provides:

"Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both."

---

[1] F.R.Crim.P §7 (c) provides that "The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law *which the defendant is alleged therein to have violated.*" [Emphasis supplied.]

In construing this statute it is pertinent that it was an amendment to a prior statute which had made wilfulness something that had to do with a wrongful purpose. That statute reads in pertinent part:

> ". . . whoever, for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States . . . shall be [punished]."
>
> 35 Stat. c. 321, § 79, p. 1103.

The precise meaning of the word "willfully" depends upon the context in which it is used.[2] In view of the amendment of the above quoted statute from which Section 911 was derived, we think it clear that the government in a prosecution under Section 911 need not show that the misrepresentation was made for a fraudulent purpose, and that "willfully" as used in this section means only that it must be proved beyond a reasonable doubt that the misrepresentation was voluntarily and deliberately made.[3]

Appellant's contention is that the prosecution failed to maintain its burden of proof on this issue since it offered no direct evidence that he "willfully" signed a printed renewal application for a state license costing but five dollars to sell beverages at a store in Oakley owned by himself and other partners.

This application contained twelve questions, the eighth being, "Are you a citizen of the United

---

[2]See, e.g., Screws v. United States, 325 U.S. 91, 101 (1945); United States v. Illinois Central R.R., 303 U.S. 239 (1938); United States v. Murdock, 290 U.S. 389 (1933).

[3]DePratu v. United States, 171 F.2d 75 (Cir. 9, 1948); United States v. Franklin, 188 F.2d 182 (Cir. 7, 1951).

States?", to which the answer typed in on the application form when appellant signed it is "yes".

The application appellant signed contains the following:

> "I have read the foregoing application and know the contents thereof and such and all of the statements therein made are true; . . . that no person other than the applicant or applicants has any direct or indirect interest in the applicant's or applicants' business to be conducted under the license(s) for which this application is made."

The uncontradicted testimony summarized by the court is that the appellant is:

> ". . . the president of several corporations operating supermarkets as well as engaged in the business of General merchant, grocery store, meat market, furniture store, drug store, department store, cattle business, rancher, and Northwestern Development Company, uranium business, farmer, and . . . has amassed a fortune of half a million dollars while so engaged. . . ."

Also uncontradicted is the testimony of appellant's agent that in the course of his business, appellant signs 200 to 300 business documents a week.

One Helton, who was supervisor of the partnership's many stores, seeking a renewal of the five dollar state license to sell alcoholic beverages at the partnership's Oakley store applied therefor to the office of the State Board of Equalization at Martinez. Helton testified that a clerk in the office of the Board typed up an application form to be signed by appellant, and advised

Helton that the form required the verified signature of a member of the partnership. Although California law requires that the names of all partners appear on the form, only appellant's name was typed thereon by the clerk who further typed "yes" on the form in answer to the printed question. "Are you a citizen of the United States?" Helton stated he then took the filled-in application to appellant's office where, without reading it, appellant signed it. Thereafter Helton took it to a notary who signed the form's verification though appellant never appeared before him. Helton thereafter mailed it to Sacramento.

The above testimony, unshaken on cross-examination, might nevertheless be disbelieved by the judge and the question would then arise whether eliminating that testimony the mere signed document itself proved willfulness. We think under the above cases that it does not.

The government contends, however, that the record contains ample evidence of appellant's other misrepresentations concerning his citizenship which is admissible to negate appellant's contention that the misrepresentation with which he is here charged resulted from mere carelessness and inadvertence.

The history of appellant's career in this country as it appears in the record reveals that appellant's false statement as to his citizenship in the application for the license was neither the first nor the last occasion on which appellant misrepresented not only his citizenship but his identity.

In 1929 appellant, born in China, was legally admitted to this country for permanent residence. Shortly after his arrival he met a Chinese United States citizen named Charlie Wah You. Appellant was understandably anxious to become a citizen and although it was explained to him that this was impossible, Charlie Wah You offered to consult an attorney to see what could be done. An attorney was retained, and on the basis of the perjured testimony of Charlie Wah You an order issued from the California Superior Court establishing appellant's birth in California as the son of Charlie Wah You. It appears that appellant subsequently consulted another attorney concerning the legality of this arrangement. Both the attorneys involved and Charlie Wah You have since died.

Thereafter appellant continued to identify himself under his "adopted" name as Donald or Sam Wah You or Wahyou. Under this name in 1947 he obtained, as a native citizen, a United States passport to visit Hong Kong. Both before and after the violation of Section 911 with which he is here charged, appellant in applications for life insurance represented himself as having been born in Sacramento, California.

Since the fact that appellant signed the license application is not disputed, and the only question here concerns his willfulness in so doing, it is clear that this evidence of the other transactions in which he made similar misrepresentations was properly admissible to negate his contention that he did so inadvertently. 2 Wigmore, Evidence §302, (3rd ed. 1940); McCormick, Evidence §164 (1954).

Appellant contends that there is no finding as to his willfulness and that the court confined itself to a criticism of his veracity in the following language:

> "On the contrary, his brash carelessness, if such be the case, emphasizes his criminality."

In this he ignores the finding in the judgment and commitment that,

> ". . . the defendant at Stockton, California, did *knowingly and unlawfully falsely represent himself to be a citizen of the United States* without having been naturalized or admitted to citizenship, or otherwise being a citizen of the United States." [Emphasis supplied.]

We conclude that this evidence clearly supports the trial court's conclusion that appellant willfully misrepresented his citizenship in signing the application, and appellant's conviction on Count One is therefore affirmed.

(Endorsed:) Opinion. Filed May 20, 1957.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Chow Bing Kew, Appellant, vs. United States of America, Appellee.	No. 15,251

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Sourthern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court on the second count of the indictment be, and hereby is reversed, and it is ordered dismissed, and that the judgment of the said District Court on count one of the indictment be, and hereby is affirmed.

(Endorsed) Judgment
Filed and Entered: May 20, 1957
Paul P. O'Brien, Clerk.

Appendix B

Pertinent sections of the California Alcoholic Beverage Control Act (now Business and Professions Code, sec. 23000, et seq.) are as follows:

"Any on-sale license authorizes the sale of the alcoholic beverage specified in the license for consumption on the premises where sold. * * * " (Business and Professions Code, sec. 23396; derived from Chap. 1257, 1951 Stats., p. 3121-3122, sec. 6 (j)).

"A retail package off-sale beer and wine license authorizes the sale, to consumers only and not for resale, of beer in packages and in quantities of 31 gallons or less per sale and wine in packages and in quantities of 52 gallons or less per sale, for consumption off the premises where sold." (Business and Professions Code, sec. 23393; derived from Chap. 1257, 1951 Stats., p. 3121, sec. 6 (g)).

"No on-sale general license nor on-sale general license for seasonal business shall be issued to any applicant who is not a citizen of the United States, or to a corporation applicant, unless a majority of the members of the board of directors, and all of the persons other than directors, who are charged with the duty of managing or conducting the business of the licensee, are citizens of the United States. No on-sale general licensee nor on-sale general licensee for seasonal business shall knowingly employ any person to manage, direct or conduct the business who does not have the qualifications required of a holder of the license." (Business and Professions Code, sec. 23788; derived from Chap. 1566, 1947 Stats., p. 3221-3222, sec. 4).

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 283

CHOW BING KEW,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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Table of Authorities Cited

Cases

	Pages
Hagner v. United States, 285 U.S. 429, 52 S.Ct. 417, 76 L.Ed. 861	2, 3
Holsman v. United States, 248 Fed. 193	3
United States v. Debrow, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92	4

Statutes

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 283

CHOW BING KEW, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner asks leave to supplement his petition for writ of certiorari with the material which follows herein:

Subsequent to the docketing of the petition for certiorari in this Court, the court below on October 21, 1957, denied petitioner's motion for leave to file a second petition for rehearing in that court. The opinion filed on that motion is printed in the appendix hereof. On October 26, 1957, the clerk of that court

forwarded to this Court a copy of the supplemental transcript of record.

In denying the motion for leave to file a second petition for rehearing, the court below held that the indictment charged sufficient facts to constitute an allegation that petitioner willfully represented himself to be a citizen.

It is to be observed that this case does not turn merely upon this matter of pleading. We submit that (a) it fairly appears from the transcript that the trial court was under a misapprehension of the law throughout and applied the erroneous theory that carelessness on the part of petitioner was sufficient to constitute guilt (R. 8); (b) that the conviction could not properly be sustained by the Court of Appeals on the theory that proof of unrelated acts of petitioner could create an inference of willful conduct on the occasion charged; and (c) that the Court of Appeals is also in error in its conclusion that the indictment sufficiently charges a violation of 18 U.S.C. 911.

The Court of Appeals in its opinion of October 21, 1957 cites cases in support of the proposition that, if a necessary element of an offense can by fair construction be found within the terms of the indictment, then the indictment is immune from attack on the ground of insufficiency. We think it is clear that the indictment in the case at bar does not fall within this principle.

The Court of Appeals appears mainly to rely upon the decision of this Court in *Hagner v. United States*, 285 U.S. 429, 52 S.Ct. 417, 76 L.Ed. 861. In that case,

the indictment was laid under 18 U.S.C.A. 338, and the question was whether allegations that the defendants for the purpose of executing a scheme to defraud placed in the mails in Pennsylvania a letter to be delivered to an addressee in Washington, D. C. were sufficient to charge an offense in the District of Columbia. The court held that, while the indictment did not in set terms allege the delivery of the letter, a presumption to that effect results from the facts which were alleged, viz., that the defendants had placed the letter in a post office to be delivered to an address in the District of Columbia. That is far from holding that the word "knowingly" is the equivalent of the word "willfully" where the latter element is a necessary part of the statutory offense.

In the *Hagner* case, this Court cautioned that it was not the intent of Section 1025 of the Revised Statutes to dispense with the rule which requires that the essential elements of an offense must be alleged.

As a matter of fact, in the case of *Holsman v. United States,* 248 Fed. 193, cited by the Court of Appeals, it was observed that allegations that parties "knowingly and unlawfully" conspired to commit an offense were merely formal, and that it should appear by reasonable intendment that what they were charged with conspiring to do was done with willful intent. The decision then pointed out that facts which were there alleged necessarily imported willfulness.

Likewise, in the other cases cited by the Court of Appeals, there were specific factual allegations which by reasonable intendment constituted allegations of

willfulness on the part of the defendant. As stated by this Court in *United States v. Debrow*, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92:

> "An indictment is required to set forth the elements of the offense sought to be charged."

True, the element of willfulness may be set forth either by express allegation or by facts constituting the equivalent thereof. In the indictment in the case at bar, there are no facts with regard to this particular element of the offense sought to be charged, unless it can be said that the words "knowingly" and "willfully" are synonymous and interchangeable. Since Congress has seen fit to prescribe that the statute involved can be violated only by willful conduct, we submit that the omission to charge this necessary element cannot be supplied by substitution of the word "knowingly". The cases cited at page 9 of the petition for writ of certiorari support our view that the word "knowingly" is not to be regarded as the equivalent of the word "willfully" where the latter element is a statutory ingredient of the offense sought to be charged.

In the cases cited by the Government at page 6 of its brief in opposition to the petition for a writ of certiorari, either the statute involved did not specifically require an element of willfulness or the facts were pleaded in such specific detail as to constitute the equivalent of an allegation that the conduct was willful.

In the case at bar, not only has the element of willfulness not been pleaded directly or indirectly, but

that element has been disregarded throughout the proceedings in the courts below. Confronted with the fact that the evidence was uncontradictedly to the effect that the license application was for a partnership, that petitioner's citizenship was immaterial, that the statement as to petitioner's citizenship which appeared in the document was inserted, not by him, but by a clerk in the licensing office, that petitioner was not present at that time, and that the application had never been read by petitioner, the trial court made a finding in effect that, if petitioner signed the document unread, he had been brashly careless, and from that equivocal finding, inferred his guilt. The Court of Appeals undertook to support the conviction on the basis of evidence with respect to other representations of petitioner at other times. In short, the court below appears to have indulged the inference that, on the basis of other disconnected acts of petitioner, it could be assumed that his action in this instance was willful, notwithstanding the uncontradicted evidence to the contrary.

It thus appears that in this case there was neither a proper allegation of willfulness, nor any evidence of willfulness, nor any proper finding of willfulness. The trial court in some manner persuaded itself that an inference of carelessness on the part of petitioner which could be drawn from the evidence would be enough to sustain a conviction under the statute involved. It is needless to observe that if a jury, under such an instruction of the court, had arrived at a verdict based upon any such proposition of law, the

conviction could not stand. The same result necessarily follows where the error was made by the court itself in misapplying the law in its consideration of the facts.

SUMMARY AND CONCLUSION.

As the case at bar is now presented to this Court, it is clear that:

1. The indictment charging the petitioner contained no facts alleging he made the statement "willfully". The Court of Appeals says this omission can be supplied *inferentially* from the use of the word "knowingly".

2. Upon the trial there was no evidence whatever that the petitioner made the statement at all, let alone that he made the statement "willfully." Defendant could not have made the statement at all if he did not supply the information for the form and did not read it, and the evidence was uncontradicted on these matters. The Court of Appeals says this omission can be supplied *inferentially* from evidence that, in completely unrelated instances, petitioner has claimed United States citizenship on other occasions.

3. The trial court made a specific finding (R. 8) to the effect that claimed ignorance (of the making of the statement by petitioner) does not relieve him of criminal responsibility. "On the contrary, his brash carelessness, if such be the case, emphasizes his criminality."

Counsel for petitioner believe that these findings can only mean that the trial court believed that "brash carelessness" was sufficient to replace "willfulness" as an essential component of the crime and that petitioner's ignorance of the statement in the application meant nothing in view of his "brash carelessness".

The Court of Appeals says this was remedied by the finding in the judgment and commitment that:

> "The defendant at Stockton, California did knowingly and unlawfully falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or otherwise being a citizen of the United States."

Here again, there is no finding of willfulness, and as pointed out at page 8 of the petition for writ of certiorari, this was not intended as a finding but was a mere formal recital (at the time of imposing sentence) of the steps previously taken by the court and was couched in the language of the indictment.

We earnestly contend that this Court should not allow a conviction to stand where the most essential ingredient of the crime has been omitted from (1) the indictment, (2) the trial, (3) the findings, (4) the law as applied by both the trial court and the Court of Appeals.

We earnestly contend that those essential ingredients cannot be supplied by inference upon inference derived from other unrelated acts of petitioner, all of which omissions by the trial court and Court of

Appeals are contrary to the law as settled by this Court in decisions cited in the petition for writ of certiorari.

We believe that the decision of the Court of Appeals is in conflict with applicable decisions of this Court, for the reasons heretofore set forth; that the Court of Appeals in this case has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the trial court as to call for an exercise of this Court's supervision; and that the Court of Appeals in its decision has also decided an important question of federal law which has not been, but should be, settled by this Court.

We therefore respectfully pray that the petition for a writ of certiorari be granted.

Dated, San Francisco, California,
November 12, 1957.

ARCHIBALD M. MULL, JR.,
FORREST E. MACOMBER,
KENNETH G. MCGILVRAY,
Counsel for Petitioner.

ARTHUR J. PHELAN,
Of Counsel.

(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

CHOW BING KEW, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15,251 Oct. 21, 1957

Denial of Leave to File Second Petition for Rehearing.

Before: DENMAN, BONE and FEE, Circuit Judges

DENMAN, Circuit Judge:

Chow Bing Kew, hereafter Chow, now seeks leave to file a second petition for rehearing on the contention that the first count of the indictment fails to charge a crime in violation of 18 U.S.C.A. §911 and hence, he contends, the court lacks jurisdiction to consider it.[1] That count states:

> "Count One: That CHOW BING KEW, alias SAM WAHYOU, alias DONALD HAROLD WAHYOU, (hereinafter called "said defendant"), heretofore, to-wit: On or about January 18, 1952, at Stockton, County of San Joaquin,

[1]This is although the contention was not contained in his statement of points to be considered on appeal, nor in his briefs, nor in the hearing, nor in its petition for rehearing.

State and Northern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did knowingly, and unlawfully falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States (18 U.S.C.A. 911)."

Chow's contention is that this count of the indictment fails to use the word "wilfully" and hence fails to state the crime under 18 U.S.C. §911 which provides that:

"Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both."

Concerning the word "wilful" in a criminal statute the Supreme Court states in Screws v. United States, 325 U.S. 91 at page 101:

"We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' Spies v. United States, 317 U.S. 492, 497. At times, as the Court held in United States v. Murdock, 290 U.S. 389, 394, the word denotes an act which is intentional rather than accidental. And see United States v. Illinois Central R. Co., 303 U.S. 239. But 'when used in a *criminal statute it generally means an act done with a bad purpose.*' Id., p. 394. And see Felton v. United States, 96 U.S. 699; Potter v. United States, 155 U.S. 438; Spurr v. United States, 174 U.S. 728; Hargrove v. United States, 67 F.2d 820. In that event something more is

> required than the doing of the act proscribed by the statute. Cf. United States v. Balint, 258 U.S. 250. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, supra, p. 734; United States v. Murdock, supra, p. 395." [Emphasis added.]

The word "wilful" in the statute need not be repeated in the indictment, at least if the question is not raised in the court below or on appeal, if the "necessary facts" showing the "bad purpose" of the accused's conduct "appear in any form, or by fair construction can be found within the terms of the indictment." Hagner v. United States, 285 U.S. 429, 433 (1932). See also, Kramer v. United States, 166 F. 2d 515 (9th Circ.).

We think that by "fair construction" of the words of the indictment—that the accused "did knowingly and unlawfully falsely represent himself"—they clearly mean that he acted "wilfully" in making his false statement that he is a citizen of the United States.

This question has been considered by us repeatedly. In Nickell v. United States, 161 Fed. 702 (9th Circ.), cert. denied 214 U.S. 517,[2] it was contended that the indictment failed to charge that the following acts were done wilfully as required by the statute:

> "When, in truth and in fact, as each of the said persons would then well know, and as they,

[2] So also in Holsman v. United States, 248 Fed. 193, 195 (Cir. 9); Cf. Johnston v. United States, 145 F.2d 137, 138 (Cir. 9).

the said Henry W. Miller, Frank E. Kincart, Martin G. Hoge, and Charles Nickell, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit, respectively, and would have made agreements and contracts with other persons by which the titles which they should acquire from the said United States in such lands would inure to the benefit of persons except themselves."

This court held:

"If the defendants knew that these affidavits would be false, and knew that the entrymen would have made contracts for the conveyance of the lands to be acquired by them, and having this knowledge nevertheless procured the making of them, there can be but one conclusion, and that is that they wilfully, which is but another name for intentionally, entered into the conspiracy charged. While matters of substance are as essential now as before the passage of the statute, and of necessity must always remain so, we take it that its enactment was intended to have substantially the same effect as those of many of the states, which provide that an indictment which will enable a person of common understanding to know what is intended is sufficient.

"In Van Gesner v. United States, 153 Fed. 54, 82 C.C.A. 188, it was observed by this court:

'When the facts alleged necessarily import such willfulness, the failure to use the word itself is not fatal. Such failure, under such circumstances, would not be fatal even at common law.'"

Chow contends that the Fifth Circuit has held otherwise in Pullen v. United States, 164 F.2d 756. A charge was brought under a statute (then 18 U.S.C. Sec. 52) making it an offense for any person, under color of law, wilfully to subject any person to the deprivation of any constitutional rights. The indictment charged only that the defendants, law officers, "did subject" a person to the deprivation of the right to be secure in his person. There was no allegation as in the instant case, relating to the intent or mental state of the defendants or from which it could be determined that the defendants' acts were knowing, unlawful, deliberate, or other than inadvertent.

Chow also cites as a general rule the following from Marteney v. United States, 218 F.2d 258, 261:

> "When 'wilfulness' is made an essential element of an offense, as it is in this case, it is a general rule that a failure to allege wilfullness is fatal to the indictment."

In so doing he conspicuously omits the next cited opinion on which the court relies, namely, Hagner v. United States, 285 U.S. 485, considered supra, stating that allegations which are the equivalent of "willfulness" are sufficient.

Chow further contends that the indictment is fatally defective in failing to state the person to whom the false claim to citizenship was made, citing two district court cases decided before 18 U.S.C.A. §911 was amended to the present form. It then read:

> "Whoever, for any fraudulent purpose whatever, shall falsely represent himself to be a citi-

zen of the United States, without having been duly admitted to citizenship, shall be fined not more than $1,000, or imprisoned not more than two years, or both."

The two cases, United States v. Weber, 71 F. Supp. 88, 91 and United States v. Raymond, 37 Fed. Supp. 957 are based on the theory that because a statement defrauding some one is involved the person defrauded by believing the statement should be named. Since the element of fraud is not in the amended statute controlling here, there is no merit to the contention.

The motion for leave to file a second petition for rehearing is denied.

(Endorsed:) Opinion on petition for leave to file second petition for rehearing. Filed Oct. 21, 1957.

Paul P. O'Brien, Clerk.

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In the Supreme Court
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No. 283

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CHOW BING KEW,
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SECOND SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner respectfully asks leave to further supplement his petition for a writ of certiorari by filing herewith, as an appendix hereto, the decision of the Court of Appeals for the Ninth Circuit in the case of *Arthur King Wilson v. United States of America*, No. 15,301, which was filed subsequent to the preparation of petitioner's previous supplement to his petition for a writ of certiorari.

We respectfully present the *Wilson* decision to this Court because we believe it correctly expounds a principle of law which the same Court overlooked in petitioner's case, to-wit: That where a trial Court in a non-jury case has misconceived the law and has applied an improper standard of law to the facts of the case, the conviction must be reversed.

In petitioner's case, the trial Court based its adjudication of guilt (R. 14-15) on the finding and conclusion that petitioner "is in no position to relieve himself of criminal responsibility because of claimed ignorance. On the contrary, his brash carelessness, if such be the case, emphasizes his criminality" (R. 8). In short, the trial Court decided the question of guilt or innocence on the erroneous premise that carelessness would be sufficient to constitute the criminal intent prescribed in the statute.

In the *Wilson* case, supra, the Court of Appeals for the Ninth Circuit reversed the judgment of the trial Court, sitting without a jury, because the trial Court misconceived the requisite subjective element of willfulness in adjudging the appellant guilty of attempting to evade payment of taxes, holding that "it is no answer to the application of an erroneous standard of law that the evidence is sufficient to support a verdict reached in accordance with the proper standard of law."

Fundamentally, the situation in petitioner's case is identical with that in the *Wilson* case, supra. In petitioner's case, the trial Court entered judgment "in accordance with the findings of fact and conclusions

of law contained in the ruling on motions for judgment of acquittal filed herein" (R. 14-15). That ruling expressly stated that petitioner "is in no position to relieve himself of criminal responsibility because of claimed ignorance. On the contrary, his brash carelessness, if such be the case, emphasizes his criminality" (R. 8). This can mean only that the trial Court's conception of the law was that if it be true that petitioner signed the license application (R. 30) without knowledge that it contained a statement as to citizenship, his brash carelessness would furnish the necessary element of criminal intent. Certainly here, in the words of the opinion in the *Wilson* case, "is a basic misconception of an essential element of the crime charged against appellant, which in truth is the critical element under the facts." The decision of this Court in *Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288, has made it clear that, in a felony case, to constitute guilt there must be not only a wrongful act but a criminal intention, that an injury can amount to a crime only when inflicted by intention, that an act unwittingly done cannot constitute willful transgression and that "the spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute."

If the trial Court in adjudging petitioner guilty conceived of brash carelessness as amounting to the

equivalent of the mental intent required by the statute, then its judgment was in conflict with the decision of this Court in the *Morissette* case, and is in conflict now with the decision of the Court of Appeals for the Ninth Circuit in the *Wilson* case. We think it is clear from the findings and conclusions of the trial Court mentioned above that the trial Court did apply such a misconception of law in adjudging the petitioner guilty of the offense charged and that the Court's subsequent recitals at the time of imposing sentence in no wise cured this fundamental misconception of law upon which the judgment of guilt was rested.

We therefore respectfully pray that the petition for a writ of certiorari be granted.

Dated, San Francisco, California,
December 2, 1957.

ARCHIBALD M. MULL, JR.,
FORREST E. MACOMBER,
KENNETH G. MCGILVRAY,
Counsel for Petitioner.

ARTHUR J. PHELAN,
Of Counsel.

(Appendix Follows.)

Appendix

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARTHUR KING WILSON, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.		No. 15,301 Nov. 14, 1957

On Appeal From the United States District Court for the Northern District of California, Southern Division.

Before: DENMAN, Senior Circuit Judge; POPE and BARNES, Circuit Judges

BARNES, Circuit Judge:

After waiving a jury trial, appellant Arthur King Wilson was tried and convicted by the District Court of six counts of willfully attempting to defeat and evade the payment of federal income taxes and Federal Insurance Contribution Act (commonly known as "Social Security") taxes withheld from the wages of employees of Coast Redwood Company, Inc., a family corporation of which appellant was President, in violation of Section 2707(c) of the Internal Revenue Code of 1939,[1] as made applicable by Sections 1430 and 1627 of said Code. The periods involved in the six counts were the second, third, and fourth quarters of 1952, which encompassed the period from April 1, 1952 to December 31, 1952, inclusive. Counts One, Two, and Three related to income taxes allegedly withheld and not paid over in the respective amounts of $49,913.33, $15,605.48,[2] and

[1] 26 U.S.C. §2707(c).

[2] The total sum withheld for federal income taxes in the third quarter of 1952 was $44,524.53. However, a partial payment was made in this quarter in the amount of $28,919.05, leaving a balance due and unpaid of $15,605.48.

$41,149.38. Counts Four, Five, and Six dealt with F.I.C.A. taxes allegedly withheld and not paid over in the respective sums of $5,559.95, $3,807.79, and $2,043.69.

The indictment charged in each and every count that appellant had committed the felonious offense

> ". . . by failing and refusing to pay said . . . taxes withheld from wages of employees to the Collector of Internal Revenue or any other person authorized by law to receive them, and by causing said corporation to fail and refuse to pay said taxes, and by withdrawing and causing funds to be withdrawn from the bank accounts of said corporation for the personal use and benefit of said defendant and corporations owned and controlled by said defendant and members of his family, and by causing said corporation to pay creditors other than the United States . . ."[3]

Appellant raises two questions on this appeal. The first and principal question may be characterized broadly as concerning the sufficiency of the evidence to support the denial of a motion for judgment of acquittal made at the close of the Government's case-in-chief and renewed after all the evidence was in. Actually appellant's argument on this point has two facets. He complains that the District Court applied an erroneous standard with respect to the subjective state of mind requisite to culpability under Section 2707(c), and further, that under the proper criterion the evidence is not sufficient to support the denial of his motions and the judgment of conviction. The other question tendered herein pertains to alleged error in the exclusion of evidence.

This is a unique criminal case. There does not appear to be a single reported decision involving a felony prosecution for failure to pay withholding taxes. The instant case is not distinguished for that reason alone. It is unusual as well in that the acts alleged to constitute the necessary overt and objective element of the violation of Section 2707(c) do not conform to the tapestry

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[3]The Government was not required to allege the particular manner by which the offense was committed. **United States v. Simmons**, 96 U.S. 360. The allegations are here set forth to crystallize the Government's position, not to state an essential element of the offense.

and pattern of deception, concealment, and artifice ordinarily found in criminal tax evasion cases.

The evidence, largely uncontroverted, discloses that apppellant organized and incorporated Coast Redwood Co., Inc., in the State of California in May of 1945. It engaged in the logging and sawmill business with operations centered in the redwood and fir forests of Northern California. The stock in the corporation was wholly owned by appellant and members of his family and he served actively as President from the date of incorporation. Coast Redwood Co. was one of several inter-related corporations owned entirely or substantially by appellant and members of his family and actively operated by appellant as President. Most of its business transactions and dealings were with these affiliated corporations. It functioned as a middle link in a vast chain of lumber enterprises whose activities extended from the acquisition of timber tracts to the sale of finished lumber. Two of these affiliated corporations, Union Bond and Trust Company and Ah Pah Redwood Company,[4] owned or were purchasing the timber tracts upon which Coast Redwood Co. conducted its logging and cutting operations. Still another family corporation, A. K. Wilson Lumber Company, purchased rough lumber from Coast Redwood and remanufactured it into finished lumber for sale in the trade. In 1952 Coast Redwood sold all of its redwood log cants to A. K. Wilson Lumber Co.

Coast Redwood had originally been capitalized for $5,000.00. It enjoyed success and prospered in the years preceding the indictment period and for that reason and perhaps also due in part to monies derived from an abortive sale of certain assets of the corporation,[5] Coast Redwood Company's capital at the end of the

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[4]The Ah Pah Redwood Company was a wholly owned subsidiary of International Pulp & Paper Company. Appellant and his family owned all of the common stock and 20% of the preferred stock in the latter corporation.

[5]Early in 1951, appellant sold the sawmill and other assets of Coast Redwood Co. to a Mr. Hull, who paid appellant $925,000 in cash prior to taking possession of the sawmill in April 1951. Mr. Hull was unable to make the installment payments required by the agreement of sale and appellant resumed control of these assets in December, 1951. When questioned as to the disposition of the money received from Mr. Hull,

fiscal year on April 30, 1952 included earned surplus of $306,433.04. This despite the fact that the corporation had encountered financial difficulties during that fiscal year and had incurred a net loss therein of $274,323.95. Adversity continued to plague the corporation during the fiscal year ending April 30, 1953 (which included almost the entire period covered by the indictment), and it sustained a net loss of $224,099.32. Part of this loss (the exact extent is vigorously disputed) was attributable to a summer fire which destroyed cut timber and hampered operations. As a result of its intensified financial plight, Coast Redwood Co. initiated proceedings under Chapter Eleven of the Bankruptcy Act on January 30, 1953. It was adjudicated a bankrupt on November 9, 1954.

A study of the past tax record of Coast Redwood Co. fails to reveal a portrait of a dutiful and diligent taxpayer. It had been delinquent in respect to meeting its obligation to pay over withheld income and Social Security taxes to the Government as long ago as 1947 and 1948. Again, at the start of the indictment period (namely, April 1, 1952), Coast Redwood Co. was delinquent in the payment of prior withholding taxes. Pursuant to an understanding reached with the Internal Revenue Service, it was paying off these past obligations at the rate of $1,000 per week. The sums paid during the indictment period were credited seriatim to the oldest outstanding obligation, in accordance with existing Internal Revenue Service policy where no instructions to the contrary are given. Neither Coast Redwood Co. nor appellant requested or instructed that the sums be applied in any different manner. Accordingly, the monies paid over to the Government during the indictment period, with the exception of the partial third quarter payment, served only to diminish prior obligations and not to pay current liabilities. However, it should be observed that payments made during each quarter of the indictment period and applied to accrued obligations did not in any

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appellant stated that it was used "to pay bills and get the property in shape where we could deliver it to Mr. Hull when the time came." [Tr. 668.]

instance equal or exceed the amount of money withheld and not paid over during that particular quarter.[6]

Appellant has resolutely maintained from the inception of the investigation into Coast Redwood Company's tax situation that the failure to pay the tax obligations on time was ascribable to the lack of sufficient funds. It was not that Coast Redwood Co. never had adequate funds to meet its tax obligations. The corporation's books and accounts completely refute such a contention. Coast Redwood Co. kept two bank accounts which during each month of the indictment period reached substantial credit amounts, although, it must be added, the general overall state of these accounts was one of constant overdraft.[7] It was rather, appellant claims, that Coast Redwood Company's financial resources were so severely drained by the business setbacks it was experiencing in 1952, and it was so beset by other pressing obligations and impatient creditors that it was not possible to pay the Government in full if the corporation was to survive. Consequently, as appellant depicts the scene, Coast Redwood Co. was confronted with a continuing perplexing problem arising from the described predicament—who shall be paid and how much?

Appellant was chief executive officer of the corporation. It was his responsibility to determine how corporate funds should be expended. He was not himself the "disbursing officer" for the corporation, but he had the final word as to what bills should or should not be paid, and when. Possessed of such authority and power, he came within the purview of Section 2707(d) of the I.R.C. of 1939, which defines a "person" subject to the preceding

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[6]An aggregate amount of $87,973.00 was paid over to the Collector of Internal Revenue during the indictment period, of which the sum of $28,919.05 was applied, as noted previously, to the third quarter liability and the balance of which was credited to back taxes which accrued prior to the commencement of the indictment period.

[7]Coast Redwood Company's bank accounts can most accurately be characterized as active and fluctuating. The following example vividly illustrates the dynamic state of the corporation's bank accounts. Its commercial account at the Arcadia Branch of the Bank of America showed a balance of $21.44 on August 8, 1952. The next day the balance was $18,816.85. And on August 11, 1952, the account showed that $20.76 was overdrawn.

subsections of §2707.[8] Appellant asserts that his choice was highly circumscribed. He says he could have paid the Government in full and neglected most of the other creditors entirely. Had he done this, appellant submits, Coast Redwood Co. would have been forced to shut down. He could have apportioned payments of available funds to various creditors, including the Government, and continued in business. Appellant states that he wanted to remain in business, expected and hoped to extricate Coast Redwood Co. from its embarrassed financial status, and planned to pay off all creditors in full. Of course, attainment of his related objectives lay with the latter alternative, which appellant therefore chose to pursue.

In order to stay in business, Coast Redwood Co., according to appellant, had to pay its current trade obligations such as payroll, suppliers, log haulers, insurance, and other similar operating expenses. Otherwise the necessary services rendered by this group of creditors would not have been forthcoming. Accordingly, appellant ordered that these obligations be accorded top priority. An Internal Revenue Service agent quoted appellant as later saying that he was, in effect, robbing Peter to pay Paul and the United States was Peter in this instance. The agent testified that appellant also admitted that the Government rated a low priority. Appellant does not deny that the Government was not given first preference but urges in justification of his policy that he was at all times trying to do what he thought most likely to assure preservation of the corporation and eventual payment in full to all creditors including the United States.

Wilson did not seek to conceal his policy or Coast Redwood Company's actual tax liability from the Government. Throughout the indictment period Coast Redwood Co., under appellant's stewardship, filed full, accurate and timely tax returns reflecting

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[8]Section 2707(d) provides as follows:

"The term 'person' as used in this section includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

Appellant does not contest on this appeal the sufficiency of the evidence to support a finding that this provision applies to him. Cf. **Levy v. United States**, 140 F.Supp. 834; **Cushman v. Wood**, 56-2 USTC 9690 (1956); **Wade v. United States**, 54-2 USTC 49,066 (1954).

the amount of money owed. Appellant acknowledged, and never disclaimed, Coast Redwood Company's tax liabilities. He simply refused to direct their payment.

The operations of Coast Redwood Co. were considerable in scope and volume. During the indictment period its gross receipts totaled $2,412,635.00 and its total disbursements amounted to $2,414,263.00. As heretofore noted, Coast Redwood Company's business activities were conducted principally with affiliated corporations. Many of the expenditures and receipts during the nine month period covered by the indictment involved these affiliates. The inter-corporate dealings and transfers of funds from one entity to another were numerous and complicated. Counsel for both sides devoted much attention and placed much emphasis upon whether these dealings and transfers constituted an affirmative attempt to siphon off available funds to affiliates, and were designed by appellant to evade and defeat the payment of the tax obligations. No useful purpose would be served by encumbering this opinion with complications of these myriad transactions in light of our disposition of this appeal and the grounds therefor. It suffices to say that the original set of figures shows a net inflow to Coast Redwood from these dealings; the adjusted journal entries indicate a net outflow resulted from these transactions. A considered analysis of the evidence adduced on this point leads to the conclusion that while some dealings are questionable it does not appear that Coast Redwood Co. flagrantly favored, or was favored by, its affiliates. For example, while it is true that Coast Redwood Co. granted A. K. Wilson Lumber Co. a five percent discount for non-existent brokerage fees on log cants sold to it, it is also true that Coast Redwood Co. purchased its stumpage at the same price paid by its affiliates to the timber tract owners.

Appellant supports various payments made to affiliates in preference to clearing up the tax obligations on the ground that these payments and in some instances, loans, were necessary to keep the other corporations solvent, and that in view of the interrelationship between his various corporations it was essential to Coast Redwood Company's continued existence that the affiliates remain in business. It should be noted here that the evidence fails to reveal any diversion of funds from the corporation di-

rectly to apppellant or his family. Appellant drew no salary during the idictment period and the corporation never declared or paid a dividend in its ill-fated lifetime.[9]

It should be noted also that appellant's version of Coast Redwood Company's dire financial condition and consequent dilemma, especially the assertion that preservation of the business rested on non-payment of the tax liabilities, was challenged by the Government and apparently disbelieved by the court below. The District Court was seemingly of the opinion that appellant's explanatory's statements, self-serving in character, were not persuasive because the tax obligations represented a mere pittance in the overall financial dealings of the corporation. Of course, the trier of fact was free to discount appellant's testimony and no error was committed thereby. Appellant's defense has been here considered at length, not to permit an appellate tribunal to "second guess" a trial court on a factual issue, but to highlight the especial significance of the constituent mental element of the offense under the circumstances of the instant case.

Another facet of the instant fact situation deserves mention. Appellant and representatives of the Internal Revenue Service conferred from time to time during the indictment period regarding the matter of Coast Redwood Company's tax delinquences.

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[9]Two Coast Redwood Co. checks were drawn to the order of appellant during the indictment period. The first was a $1000 check drawn in October, 1952 by an employee acting apparently without appellant's knowledge and consent. It was restored to Coast Redwood Co. the next month. The second was a $19,000 check issued on November 28, 1952. The sum represented by this check wove a tortuous path through appellant's many corporate entities, but did not come to rest in his account. The sum was transferred to the account of A. K. Wilson Lumber Co., which treated the transaction as a transfer of funds from Coast Redwood Co. to Union Bond, and from Union Bond to A. K. Wilson Lumber Co.

The Government also sought to establish that appellant was depleting the funds of A. K. Wilson Lumber Co. and thus indirectly siphoning Coast Redwood Co. funds. The basic premise of the Government's charge is that funds were transferred from Coast Redwood Co. to A. K. Wilson Lumber Co. or, A. K. Wilson Lumber Co. refused to pay its obligations to Coast Redwood Co. for tax evasion motives. Consequently, the textual discussion covers this point.

Invariably these conferences culminated in a promise by appellant that the corporation would, among other things, make regular installment payments of a certain sum or would settle its tax liabilities by a certain date. Just as invariably, for one reason or another, Coast Redwood Co. never fulfilled its undertakings. Nevertheless, the Internal Revenue Service acquiesced repeatedly in the delays and refrained from seizing the corporation's property in the hope that the business could be preserved; the same hope appellant urges was motivating him. Unfortunately, appellant's expectation proved groundless and his hopes were dashed. Coast Redwood Co. collapsed and was ultimately adjudicated a bankrupt. Had events taken a different turn, this case might not be before us.

We turn now to a consideration of the statute. Section 2707(c) provides as follows:

> "Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony. . . .(penalties omitted) . . ."

Since appellant both collected and accounted for the withheld monies, conviction under this section can be predicated only on the willful attempt to evade or defeat the payment of the taxes.

The conduct rendered felonious by §2707(c)—the willful attempt to evade or defeat the payment of taxes—contains two constituent elements. They are a particular subjective state of mind—"willful"—and certain objective activity carried on pursuant to such mental state—"attempt to evade or defeat the payment of the taxes." They must coexist to constitute an offense. In other words, the defendant must have willfully engaged in the attempted evasion.

The District Court took the position during the course of the trial that the knowing and intentional disbursement to others of funds withheld from employees for payment of income and Social

Security taxes constituted an offense under §2707(c). Under this view the Government was required to prove only that appellant was cognizant of the tax obligations, that corporate funds were physically available for their payment, and that appellant intentionally chose to divert these funds to other uses. The motivation and purpose which governed the distribution of funds were deemed immaterial. Appellant asserts that this approach misconceives the requisite mental element of the crime and that it was incumbent upon the prosecution to prove that an evil motive or bad purpose controlled appellant's direction of the disbursement of Coast Redwood Company's funds.

To fully comprehend the nature of the conduct condemned by §2707(c), it is necessary to examine the section in the statutory framework in which it appears. §2707(c) is the apex of a series of penalties for assorted violations of the internal revenue laws. §2707(a) prescribes a 100% civil penalty for willful failure to pay, collect, or truthfully account for and pay over certain taxes and for willful attempt to evade or defeat the tax or its payment. And §2707(b) makes it a misdemeanor to willfully fail to pay a tax covered by this subsection, make returns required by law, keep such records as are required by law, or to supply such information as is required by law. Subsections (a), (b), and (c) all require that the person act willfully in failing to perform his statutory duty.

However, the term "willful" is not defined in the statute. Nor does the legislative history afford illumination on this point. We move thence to the decisional law on the definition of this term. The word "willful" is susceptible of many meanings. Its interpretation is frequently influenced by its context. It may mean one thing in civil cases and quite another thing in criminal prosecutions. When used in criminal revenue statutes, it has generally been construed to mean an act done with evil motive, bad purpose, or corrupt design. *United States v. Murdock*, 290 U.S. 389, *Spies v. United States*, 317 U.S. 492. The *Spies* case, a landmark decision in this area of law, involved a felony conviction for attempted income tax evasion under Section 145(b) of the I.R.C. of 1939. The Supreme Court, in reaffirming the traditional notion of the mental element required for criminal conviction for nonpayment of taxes, declared:

"The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempts to defeat and evade one, which is made a felony, is not easy to detect or define. • • • It (willful) may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, *we would not* without the clearest manifestation of Congressional intent *assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree.* We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."

317 U.S. at 497-8. [Emphasis added.]

The Supreme Court's precise holding in the *Spies* case was that the District Court erred in refusing to give a requested instruction that if the jury found only that defendant had willfully failed to make a tax return and willfully failed to pay the tax due, then it could not find the defendant guilty of a willful attempt to defeat and evade the income tax. Section 145,[10] dealing with income taxes, is analogous, and phrased similarly, to section 2707. Both statutes draw a distinction between the willful failure to pay a tax, which in each instance constitutes a misdemeanor, and the willful attempt to evade or defeat the payment of a tax, which in each instance, is a felony, a distinction which, the Supreme Court readily conceded "is not easy to detect or define." 317 U.S. at 497. The Court held that the difference between the two kinds of prohibited conduct is that the word "attempt," as used in the felony section, denotes an affirmative act of evasion rather than a willful omission designed to evade the tax. The mere willful failure to pay, without more, could constitute no more than the misdemeanor.

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[10] 26 U.S.C. §145.

The Supreme Court noted that Congress had used the comprehensive phrase "in any manner" in stating the modes by which a willful attempt to evade and defeat a tax might be achieved. It then listed "by way of illustration, and not by way of limitation" some of the more common methods of attempted evasion, "such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct, the Supreme Court stated, "the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." 317 U.S. at 499.

The unusual facts of the case at bar do not reveal the common examples of badges of fraud set forth by the Supreme Court. Of course, the phrase "in any manner" covers novel and unusual as well as common methods of evasion, for it is all-inclusive. *United States v. Gordon*, 3 Cir., 242 F.2d 122; Rothwacks, Law and Procedure in Criminal Tax Prosecutions, 26 Taxes 797 (1948). Consequently, the diversion of available funds to affiliates and other creditors in preference to payment of Government obligations qualifies as an affirmative act under the statute and would warrant conviction if done with the requisite state of mind.

It would appear that the well-settled rule of statutory construction that statutes dealing with the same general subject matter are to be construed in pari materia is applicable, and that the *Spies* decision is determinative of the content of the subjective element required by section 2707(c).[11] There appears to be but a single salient difference between sections 145(b) and 2707(c). It is that the former deals with the defendant's taxes, while the latter involves taxes owed by others and withheld for payment to the Government. These latter tax funds constitute "a special fund" held "in trust" by the employer. Section 3661, I.R.C. of 1939. The District Court felt that the deliberate disbursement of monies held in a fiduciary capacity "which didn't belong to the defendant" is sufficient, in itself, to support a con-

[11]See **Hawkinson v. Comm. of Internal Revenue**, 2 Cir., 235 F.2d 747.

viction under §2707(c). Thus, it would be enough if proof was adduced that the defendant intentionally and knowingly acted in a manner which resulted in non-payment of the taxes and it is not essential that the acts were in fact done for the purpose of evading or defeating the payment of the taxes.

Is this distinction between ordinary taxes and so-called "special fund" taxes justified?

We cannot find support for such distinction in either the statute or the adjudicated cases arising thereunder. It is true that a difference exists in respect to the capacity in which the tax monies are held. But the duty to pay is the same in both instances, as is the effect of non-compliance. It may well be that the capacity in which the monies are held exposes the defendant to the risk of additional penalties for non-payment of taxes,[12] but there is nothing in any revenue statute which would alter the subjective element of felonious tax evasion because of the capacity in which the funds are held. It would require a clear manifestation of Congressional intent that the Internal Revenue Code should be construed to set up one rule for "special fund" taxes, and another rule for income taxes, before we could so hold. We cannot find the semblance of such Congressional intent.

The conclusion that the capacity in which the funds are held does not provide a basis for modifying the traditional subjective

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[12]One such additional obligation for the breach of which there is a concomitant penalty is the duty to account and pay over the monies, as provided in Section 2707(c). The conclusion that the capacity in which the funds are held does not alter the content of the subjective element of a felonious attempt to evade or defeat the payment of a tax is buttressed by the provisions of Section 3661 of the Internal Revenue Code of 1939. It provides that

> "Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose."

Thus, the second sentence, in terms, refutes the notion that "special fund" taxes are a novel breed of tax to which the traditional criteria of civil and criminal responsibility are inapplicable.

element of tax evasion is borne out by the cases decided under other subsections of 2707. In *Yarborough v. United States*, 4 Cir., 230 F.2d 56, the Fourth Circuit affirmed a misdemeanor conviction under 2707(a) for willful failure to file income and Social Security taxes withheld from the wages of employees. The jury was instructed in that case that willful means bad purpose, evil motive, or lack of justifiable excuse. The civil cases arising under §2707(a) also recognize that criminal liability depends upon proof of evil motive or bad purpose. *Levy v. United States*, 140 F.Supp. 834; *Nugent v. United States*, 136 F.Supp. 875; *In Re Haynes*, 88 F.Supp. 379; and *Paddock v. Siemoneit*, 218 S.W.2d 428, 7 A.L.R.2d 1062. These cases hold that it is enough to warrant imposition of the civil penalty that the defendant's actions were knowingly and intentionally taken. See also Rev. Ruling 54-158, 1951-1 Cum. Bull. 247. Compare *Kellems v. United States*, 97 F.Supp. 981, and 50-2 USTC at 9489 (1950), and *Cushman v. Wood*, 56-2 USTC at 9690 (1956), holding that mere intentional failure to pay is not even sufficient for civil purposes.

The oft-cited opinion in *Paddock v. Siemoneit*, supra, states that the term "willful" in criminal tax statutes refers to motive or purpose whereas in the civil statute it characterizes intention and knowledge. The facts of that case closely parallel the instant factual situation. There it was held that the president of a corporation was civilly liable for the corporation's failure to pay withheld taxes where the reason for non-payment was that the corporation was in precarious financial condition and the withheld funds were employed to preserve the corporation. Here, too, the evidence is certainly sufficient to support a finding that the failure to pay was intentional and that the defendant was responsible for such failure. But that is not enough to justify a criminal conviction. To warrant imposition of the heaviest of penalties assessable for non-payment of taxes, the principal purpose of all such penalties being compliance, it must also be found that the defendant's conduct was prompted in part at least by tax evasion motives. This the trial court did not do.

The trial court's conception of the requisite subjective element under §2707(c) was voiced at length during the progress of the trial and was reiterated in comments which accompanied the formal verdict. Of course, as those experienced in trial matters

know full well, it is a hazardous and risky business to place too much reliance upon comments emanating from the bench during the course of a trial. The strained atmosphere of the trial arena, and the lack of opportunity for careful, studied consideration of the problem, is not conducive to dispassionate, deliberate and definitive comment. An able and alert trial judge, responsive to his responsibilities, will frequently intersperse questions and clarifying comments during the trial to clarify troublesome points, elicit certain evidence or state tentative views. Litigation would never be terminated if appellate courts seized upon isolated remarks of trial courts to award new trials. See *United States v. Wain*, 2 Cir., 162 F.2d 60, 65. However, there are cases where the trial court's views are set forth with certitude and clarity. This is such a case. To disregard these clear statements of the court's views, as expressed on numerous occasions, is to ignore reality. The most significant of these comments are set forth below.[13] A thorough grasp of them is indispensable if the problem which faces this court is to be fully comprehended.

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[13]The first full exposition of the trial court's approach to the subjective element required to be proved under §2707(c) came during argument by appellant's counsel, Mr. Avakian, following the presentation of the Government's case-in-chief, on the motion for judgment of acquittal. After Mr. Avakian had set forth his conception of the essential elements of the offense and related them to the instant facts, he was queried as follows:

The Court: "Do you think that there is any difference with respect to this argument as between the payment of the taxpayer's own taxes and withholding taxes?

Mr. Avakian: "I don't think so, your Honor.

The Court: "I see the force of your argument and if this were a case that involved the taxpayer's own taxes—income taxes, we will say—and the full disclosure by return of the amount due, and then the handling of his business in the manner that the records here disclose that it was handled, then I see the force of the argument as to the principles that have been laid down by the courts with respect to wilfulness and acts of commission and like matters that would probably defeat a criminal charge. I am wondering whether or not there was any difference in the application of that argument in the case of taxes of someone else that the employer is required to withhold and pay, whether there is any difference there. Is the use of the trust fund, so called—they have been described as trust funds to rather loosely designate them—but does the use of the trust funds themselves give rise to an inference to wilfulness as an act of com-

That problem is what effect should the trial court's failure to apply the proper standard of the subjective element under §2707(c) have upon the disposition of this appeal?

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mission as differentiated from the case of the taxes due by the taxpayer himself? There is a novelty here in the application of that rule that you speak of. I was wondering if you had any thoughts concerning that." [Tr. 557]

The court continued to express the same idea.

The Court: "It seems to me that that is the bigger question, as to whether or not this doctrine which you speak of (the **Spies** decision) applies to a withholding tax case, and that presents a little different question than is presented in these decisions. [Tr. 564]

Finally it turned to conviction. We trace that development:

The Court: "It doesn't make any difference whether or not in using that money that the taxpayer got more money from affiliated companies than he paid out. I don't think it can stand or fall on that at all.

Mr. Avakian: "I think it is important in this respect, your Honor: Not only must there be the wilful acts of commission, but they must be done with the specific evil intent of defeating the payment. Now, that is where I think it becomes material to know whether there was a net inflow rather than an outgo because that throws light on whether there was necessary evil intent, and it is in that respect that I think it is significant to know what the flow of funds was, because if there were only a factual showing of a knowing and intentional use of these funds for some other purpose, that would not be enough. There would also have to be evidence which would support the inference and the finding that that conduct was done for the purpose of defeating the payment of the tax. That's the distinction, of course, between this type of statute that the Spies and Murdock cases talk about, where in the administration of those revenue laws, the penalty is imposed for violation of them but there must be a showing of an evil or bad motive and that good faith is a defense to the charge. Now, that's where I think the flow of funds becomes material.

The Court: "I think that what you said is a perfectly logical conclusion to be drawn from the principles of the Spies case in connection with income taxes due from a taxpayer. In other words, it would be necessary to show some affirmative action with an evil motive to use the property of the taxpayer which would be available for the payment of taxes or his monies for the purpose of defeating the purposes of those taxes. If he used his property in connection with the normal activities of his business and they proved to be untruthful or he misjudged the consequences of it, he lost it, he was thus unable to pay his taxes, of course, it wouldn't be the

There is surprisingly little authority respecting the question of the effect upon a conviction of a trial court's misconception regarding an essential element of the offense in a non-jury case.

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kind of motive that is required to prove violation of the statute. That is why it is in order to draw the line between those acts, that philosophy that we have long ago got away from, that you imprison people for debt. As Justice Jackson said in the Spies case, there has to be some affirmative act of fraud to show that something was done with the property or assets or money of the taxpayer for the deliberate purpose of evading the payment of the taxes due.

However, the question becomes, it seems to me, somewhat different when you come to the withholding taxes under this statute because there it may be very properly said that the mere act of using this money which doesn't belong to the taxpayer at all—the money that he has, that he owes for his own taxes, that is his own money, and of course there you have to go much further in order to develop a criminal charge and that's the reason for that philosophy that is expressed in the Spies and those other cases. But the question here is this was not his money. This was money that was due somebody else, but which the law imposed upon him an obligation to hold and pay the United States.

Now, the question is under the circumstances of this case of the non-payment of these monies and the obvious use of them, whether the use of the money was well intentioned or not, in the hope of making some of the enterprises work out and so forth, that the use of that money under those circumstances was a bad motivated act. And that, it seems to me, is the rather simple question that it boils down to. Of course, none of these questions are simple but it is a rather simple question to which it boils down. I don't think that it is necessary to show bookkeepingwise what the net balance was with respect to these transfers, but whether or not under the circumstances of these various corporations and companies, whether or not the use of that money under those circumstances constitutes the affirmative act that makes up the violation of the statute. And that is a bigger question, it is a broader question. All the circumstances of the case have to be taken into account, except that I don't think that what the outcome bookkeepingwise of the transactions is has anything to do with it. It is whether or not the act of using that money in connection with these various corporations is a wilful act under the circumstances, it was done knowingly, it was done consciously, all the circumstances that make up the act of withholding and non-payment, whether the circumstances surrounding that justified a conclusion that that act of non-payment and use, irrespective

Indeed, we find no direct authority. However, analogous decisions involving jury cases and several basic principles of criminal law furnish clear guideposts to a resolution of this issue.

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of what the result of it, constitutes a wilful act, that I think is the question in this case . . ." [Tr. 568-571]

Mr. Avakian continued to urge that there was no evidence that any transfer of corporate funds was attributable to evil motivation. The trial court's reply, clearly delineating its views, follows:

> The Court: "But I don't think that has anything to do with it. You are basing that upon the point that you raise that the government has to prove that the means used were with fraudulent intent. I couldn't agree with you on that, that there had to be proof by the fact of inference that any step that was taken in connection with the matter in itself, that particular step, had to be taken with the evil motive and intent to defraud the government. I couldn't follow that because we have those questions constantly raised in conspiracy cases, for example, that the particular act itself in itself may be of an innocuous nature but if it furthers the purpose of some person who is pursuing some unlawful purpose it is in itself admissible and may be considered as an overt or an act done pursuant to a purpose which is against the law. So that I don't think that it has to be shown that a particular transfer out was with that intent; I don't think that that is necessary." [Tr. 579]

During the argument to the court which preceded the rendition of the verdict, the trial court had occasion to reiterate its views. As is readily discernible no change had occurred in respect to these views throughout the presentation of the defense.

> The Court: "I don't attach any particular importance to these so-called in-and-out transactions. I think I mentioned that once before in the trial of the case.
>
> I think the District Attorney (sic) did make some contention to that effect, but I don't think it is of any importance in the case as to whether there is any evidence of any concealment or transfer of assets as such for the purpose of evasion of tax." [Tr. 925]

And again,

> The Court: "Well, except that this is a withholding tax case and it is not a tax of the defendant that is involved. With respect to these taxes, the defendant is merely the collecting agent or trustee collector for the government.
>
> Mr. Avakian: "Well, in terms of the origin of the obligation, of course that is true. But in terms of the offense that is defined in the statute, I don't think it matters what kind of tax it was, and moreover——"
>
> The Court: "Except that the instances or facts that go to make up evasion of payment are different in cases of withholding taxes

Initially it should be noted that we are not concerned with such matters as the admission or exclusion of evidence or rulings on non-merit defenses. In such cases appellate courts often invoke the rule applied to civil judgments that if any valid basis exists for affirming the action taken below, such action will be affirmed regardless of the particular ground upon which the original decision was rested. *Wagner v. United States*, 9 Cir., 67 F.2d 656. That rule is sound and salutary and it furthers not only the ends but also the administration of justice where the erroneous theory worked no hardship nor harm upon any party.

But we are not dealing with a mere error of law occurring during the course of trial and which can be disregarded as harmless. Involved here, (if we are right) is a basic misconception of an essential element of the crime charged against appellant, which in truth is the critical element under the facts. We believe therefor that the comparable and controlling decisions are those jury cases involving the related questions of erroneous instructions. If this case had been tried to a jury and the comments voiced by the learned trial judge had taken the form of jury instructions, a conviction obtained thereunder could not stand under the principles enunciated in the *Murdock* and *Spies* decisions. Is there any difference between a trial judge formally instructing the jury as to what he thinks the applicable law to be and in effect

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than they would be with respect to the defendant's own taxes." [Tr. 935-6]

The Government contends that the comments accompanying the formal verdict show that regardless of remarks voiced during the course of the trial the verdict itself was grounded upon a correct conception of the governing law. We cannot agree. On the contrary, these comments, relied upon by the Government as the strongest expression of the applicable law made by the trial court, seem rather to reinforce the belief that a too stringent state of mind standard was applied herein. The key paragraph of those comments follows:

> "I am satisfied that the evidence shows beyond question that the defendant here knowingly and deliberately set and followed a course of so operating the business of Coast Redwood Company, Inc., as to advantage himself and his companies by the use of the withheld employees' taxes; and that such course of conduct affirmatively constituted willful evasion of payment of these taxes. This he did with full knowledge and awareness of the nature of his course of conduct and of its consequences." [Tr. 963]

instructing himself similarly in a non-jury case?[14] We think not. In each instance a conviction has resulted from the application of improper standards of law to the facts by the trier of fact. Such a case, we believe, compels reversal of the conviction.

It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way. Accordingly, it is no answer to the application of an erroneous standard of law that the evidence is sufficient to support a verdict reached in accordance with the proper standard of law. As the Supreme Court stated in a jury case in response to such a contention,

> "It may not be amiss to remind that the question is not whether guilt be spelt out of a record but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in federal courts." *Bollenback v. United States*, 326 U.S. 607, 614-5.

The decisions are plentiful that an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied. *Pearson v. United States*, 6 Cir., 192 F.2d 681; *People v. Bigley*, 35 N.Y.S.2d 130; *People v. Roper*, 259 N.Y. 170, 181 N.E. 88; *People v. Hewlett*, 138 Cal.App.2d 258, 239 P.2d 159; 24 C.J.S. Criminal Law §1834, p. 676.

It does not matter whether or not guilt is a close question. The accused is entitled in any case to be tried under proper legal criteria. But the significance of this matter is all the more accentuated in a factual context where the question is a close one. This is that type of case. It may be that appellant directed disbursements in good faith and solely for the purpose of preserving the business or it may be that he so acted in part to evade or defeat the payment of taxes. It could also be that the

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[14]Cf., Rule 75(g), Rules of Civil Pro., 28 U.S.C.A.; **Mar Gong v. Brownell**, 9 Cir., 209 F.2d 448 (1954); **Takehara v. Dulles**, 9 Cir., 205 F.2d 560 (1953).

disbursements were not made with intent to evade the payment of the taxes, but that the failure to pay was itself motivated by a desire to evade the payment of the taxes, in which case appellant could be convicted of the misdemeanor created by §2707(b). And finally, it may be that appellant did not commit any crime, and could only be held civilly accountable under §2707(a). All these possibilities exist.

Whether particular conduct is "willful" is, of course, a question of fact.[15] By its very nature, it is not generally amenable to direct proof and must be shown by circumstantial evidence.[16] The evidence adduced in the instant case is such that a verdict following any of the foregoing alternatives, if properly found, would be sustained. But the verdict must be rendered under proper and applicable rules of law.

Another point requires discussion. Ordinarily, the remedy to rectify a misconception regarding the significance of a particular fact, such as a particular state of mind, is to request special findings pursuant to the provisions of Rule 23 of the Federal Rules of Criminal Procedure. *Cesaro v. United States*, 1 Cir., 200 F.2d 232. No such formal request was made in the instant case. However, counsel for appellant repeatedly called the trial court's attention to this matter, and, as indicated previously, the trial court's remarks at the time of verdict bore on it. Moreover, counsel for the Government did not raise the point of Rule 23 on this appeal. Therefore, while we believe resort to Rule 23 ordinarily must be made to preserve such an issue on appeal, we also believe that the circumstances of this case are such that it would perpetuate an injustice to deprive appellant of the opportunity to question the propriety of the trial court's conception of the constituent elements of the offense.

The other question tendered by this appeal relates to the exclusion of certain evidence, i.e., that appellant, through his attorney, had negotiated and entered into an understanding and agreement with representatives of the Internal Revenue Service

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[15] **Gaunt v. United States**, 1 Cir., 184 F.2d 284; **Himmelfarb v. United States**, 9 Cir., 175 F.2d 924.

[16] **United States v. Commerford**, 2 Cir., 64 F.2d 28; **Capone v. United States**, 7 Cir., 51 F.2d 609.

in Portland, Oregon in May, 1955, whereby certain assets were to be sold to pay off Coast Redwood Company's tax obligations. The District Court took notice of the fact of the negotiations and understanding. It refused to allow the attorney to testify as to the details on the ground that such evidence was immaterial.

The trial judge possesses wide latitude in the determination of the relevancy or materiality of evidence and his ruling cannot be reversed in the absence of an abuse of discretion. The evidence offered went to the defendant's state of mind. It concerned actions taken over three years *after* the indictment period commenced and its probative value, if any, was slight. We cannot hold under the circumstances that the trial court abused its discretion in excluding the details of the negotiations as distinguished from the fact thereof.

The judgment of conviction is reversed and the case is remanded to the District Court for retrial in accordance with the principles set forth in this opinion.

REVERSED.

(Endorsed:) Opinion. Filed Nov. 14, 1957.

Paul P. O'Brien, Clerk.

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434921—57

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 283

CHOW BING KEW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 198) is not yet reported. The opinion of the District Court on motions for judgment of acquittal (R. 5) is reported at 141 F. Supp. 253.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1957 (R. 204). A petition for rehearing was denied on June 18, 1957 (R. 205). The petition for a writ of certiorari was filed on July 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the indictment charged, the evidence proved, and the judge as trier of facts found that petitioner's false representation that he was a citizen of the United States was willful.

2. Whether a false statement as to citizenship on an application for a liquor license constitutes a violation of 18 U. S. C. 911 even though citizenship is not a condition for the license.

STATUTE INVOLVED

18 U. S. C. 911 provides:

> Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both.

STATEMENT

In a two-count indictment filed in the United States District Court for the Northern District of California, petitioner was charged with knowingly and unlawfully representing himself in 1952 to be a citizen of the United States in violation of 18 U. S. C. 911, and with making, in 1953, a false statement to an investigator of the Immigration and Naturalization Service in violation of 18 U. S. C. 1001. After a trial by the court, petitioner was found guilty (R. 14) and sentenced to imprisonment for 18 months on each count, the sentences to run concurrently, and to fines of $1,000 and $5,000 on the first and second counts, respectively (R. 181, 182). The Court of Appeals affirmed the convictions as to Count 1 (R. 203, 204), but reversed as to Count 2, on the ground that the

count was fatally defective in failing to name anyone as committing the crime (R. 199, 204).

The government showed that petitioner, who was born in China and legally admitted to this country in 1929 as a merchant's son (R. 36, 37), had in 1952 made an application for renewal of a state alcoholic beverage license for a store (R. 30). The application, on a printed form, bore twelve questions, the eighth of which was, "Are you a citizen of the United States?" The typewritten answer was "yes." The form bore the notarised signature of "Sam Wahyou," the alias of petitioner, immediately below the following words:

> Each person whose signature appears below being first duly sworn, deposes and says: * * * (2) that I have read the foregoing application and know the contents thereof and that each and all of the statements therein made are true; (3) that no person other than the applicant or applicants has any direct or indirect interest in the applicant's or applicants' business to be conducted under the license(s) for which the application is made.

An investigator of the Immigration and Naturalization Service, having received information that a Chinese man known as "Sam Wahyou" was falsely claiming to be a native-born citizen, and finding records which led him to believe that "Sam Wahyou" might in reality be "Chow Bing Kew," questioned petitioner in April, 1953. Petitioner told the investigator, "I am a citizen of the United States. I was born in Sacramento, California" (R. 36–43). In June 1953, after a warrant of arrest had been is-

sued, petitioner, upon advice of counsel, admitted his true identity to the same investigator (R. 47–49).

Petitioner had made the same misrepresentation as to his birthplace on a passport application in 1947 (R. 46), and on applications for life insurance before and after his admissions to the Immigration Service in 1953 (R. 137–147).

Petitioner, taking the stand in his own defense, confirmed the evidence of his birth in China in 1912 and his arrival in this country in 1929 (R. 111). He testified that, from the year 1934 to the year 1953, he believed that he was a citizen as the legally adopted son of one Charlie Wahyou, a United States citizen (R. 132). He explained that his admiration for Wahyou, who was "100 percent Americanized," led him to ask Wahyou time and time again if he, too, could become an American citizen (R. 114–115). Wahyou consulted an attorney, and in 1934 the two told petitioner that papers issued to him were legal citizenship papers, and that he had been "adopted" by Wahyou (R. 118–119). Petitioner's counsel introduced records which showed the 1934 proceedings to have been not an adoption proceeding, but a petition to establish birth in which an order was issued by the Sacramento County, California, Superior Court, establishing petitioner's birth in Sacramento as Donald Harold Wah You, a son of Charlie Wahyou (R. 122). An infant named Donald Wahyou, the natural son of Charlie Wahyou, had in fact been born in 1917, but had died in 1918 (R. 33). Petitioner was aware of that fact in 1940 (R. 133). Petitioner testified that he questioned as untrue the information that he was born in the

United States (R. 119, 121, 136), but that he was told by Wahyou, the lawyer, and another lawyer whom he subsequently consulted, that it was legal (R. 118–121). Both of the attorneys involved and Charlie Wahyou were dead at time of trial (R. 124).

With respect to the misrepresentation on the 1952 license application, petitioner testified that he did not read it (R. 125); that he, as president of several corporations operating supermarkets and other businesses (R. 110), signed from 200 to 300 documents a week; and that he relied on others who submitted the papers to him (R. 125). One Helton, a supervisor of stores working under petitioner, testified that it was he who had submitted the application to petitioner (R. 99). He said that a clerk in the office of the State Board filled it out (R. 99), that he took it to petitioner who signed it but did not read it (R. 101), and thereafter had it notarized although petitioner was not present for verification (R. 99).

Petitioner explained that he signed personal insurance applications the same way, without reading the statements that he was born in Sacramento (R. 143, 147).

ARGUMENT

1. Petitioner argues that the willfulness of his false representation was not adequately charged, proved, or found by the trial judge. His contentions are without merit.

a. Although the indictment did not allege that petitioner "willfully" made a false representation, the allegation that he "did knowingly, and unlawfully

falsely represent himself to be a citizen" necessarily imported willfulness. See *Howenstine* v. *United States,* 263 Fed. 1 (C. A. 9); *Londos* v. *United States,* 240 F. 2d 1 (C. A. 5), certiorari denied, 353 U. S. 949; see also *Hagner* v. *United States,* 285 U. S. 427.

b. There was ample evidence to indicate that petitioner was aware of the 1952 misrepresentation. The judge was not required to credit petitioner's explanation that he did not read important papers which he signed. The fact that petitioner consistently, before and after the particular allegation charged in the indictment, falsely claimed citizenship by birth tends to negate petitioner's claim of carelessness. The evidence of these other misrepresentations was properly admissible to show intent. 2 Wigmore, *Evidence,* Section 302 (3rd ed. 1940).

c. The trial court did in fact make a finding of willfulness. Petitioner takes from the court's opinion on motions for acquittal an isolated statement out of context in an effort to show that the decision as to guilt was erroneously reached upon a finding of carelessness. The court said that any brash carelessness—such as the claimed practice of a president of several corporations in signing documents presented him by employees or attorneys without reading them—*emphasized* petitioner's criminality (R. 8). The opinion as a whole shows that the court found this criminality to exist. And the court's judgment was based upon a formal finding that petitioner "did *knowingly and unlawfully falsely represent himself to be a citizen of the United States* * * *" (R. 21; emphasis added).

2. Petitioner contends that no violation of the statute was proved because the question of his citizenship was immaterial to the issuance of the 1952 beverage license. In this connection he argues that the word "willfully" necessarily implies a fradulent purpose.

The fact that the laws of California do not require that a licensee of the type involved here be a citizen (Pet. App. B) does not make the false representation either irrelevant or lacking in fraudulent purpose. The state had a legitimate right to inquire as to the background and status of a prospective licensee, whether or not the fact of citizenship would be controlling. That is all that the statute requires. *Smiley* v. *United States*, 181 F. 2d 505 (C. A. 9); *United States* v. *Achtner*, 144 F. 2d 49 (C. A. 2); *United States* v. *Tandaric*, 152 F. 2d 3 (C. A. 7). And since petitioner did intend to give a false reply to a legitimate question by the state, his purpose was fraudulent.

Actually, the statute does not require that a fraudulent purpose be alleged or proved. *DePratu* v. *United States*, 171 F. 2d 75 (C. A. 9); *United States* v. *Franklin*, 188 F. 2d 182 (C. A. 7). The precise meaning of the word "willfully" depends upon the context in which it is used. See *Screws* v. *United States*, 325 U. S. 91, 101; *United States* v. *Illinois Central R. Co.*, 303 U. S. 239; *United States* v. *Murdock*, 290 U. S. 389. The words "willfully" and "knowingly" can be used to denote "deliberately and with knowledge and not something which is merely careless or negligent or inadvertent." See *Browder* v. *United States*, 312

U. S. 335, 341. It is in this sense that the word "willfully" is used in 18 U. S. C. 911. Petitioner concedes that Congress in enacting the predecessor section in the Nationality Act of 1940 (54 Stat. 1165, 8 U. S. C. (1946 ed.) 746) dropped the words "for any fraudulent purpose whatever" found in the earlier statute (35 Stat. 1103) and punished one who "knowingly" falsely represented himself to be a citizen, but asserts that, when the 1948 revision of the criminal code substituted the word 'willfully" for the word "knowingly," there was an intent to re-embrace the ingredient of bad intent. However, when the 1948 revisers intended to make an intent to defraud an element of a crime, they used clear language to such effect. *E. g.* 18 U. S. C. 915, 916. It seems evident, therefore, that "willfully" was used in this section as the equivalent of "knowingly" in the predecessor statute.

CONCLUSION

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1957.

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